RECORD AND BRIEFS

16-1220

No. 16-

FILED
APR 3 - 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit, in conflict with the decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. § 1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits.

2. Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit).

3. Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees in the court below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, defendants-appellants in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Animal Science Products, Inc. states that it has no parent company, and no publicly-held company holds 10% or more of its shares. Petitioner The Ranis Company, Inc. states that it has no parent company, and no publicly-held company holds 10% or more of its shares.

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JURISDICTIONAL STATEMENT

The Court of Appeals entered judgment on September 20, 2016, and denied a petition for rehearing en banc on November 4, 2016 (App. 298a). On January 3, 2017, Justice Ginsburg granted an extension of time to file a petition for a writ of certiorari until April 3, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED

28 U.S.C. § 1291 provides, in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

28 U.S.C. § 1291.

The Sherman Antitrust Act, 15 U.S.C. § 1 et seq., provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1.

Rule 44.1 of the Federal Rules of Civil Procedure provides, in pertinent part:

> **Determining Foreign Law**
>
> . . . . In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1.

INTRODUCTION

This case presents three important issues—two of which are the subject of circuit splits—arising from the Second Circuit's unprecedented reversal of a pre-trial order denying Respondents' motion to dismiss Petitioners' Sherman Antitrust Act complaint under the doctrine of international comity.

Petitioners represent American importers of vitamin C. Respondents are Chinese manufacturers and exporters of vitamin C. Petitioners alleged that Respondents agreed to fix prices and restrain supply in violation of the Sherman Act. There was no dispute below that Respondents' conduct violated the Sherman Act, nor was there any dispute that the Sherman Act validly applied to Respondents' foreign conduct. Instead, Respondents' raised several defenses that were all based on the claim that Chinese law had compelled their conduct. Two different district judges—one on a motion to dismiss, the second following both summary judgment and post-trial motions—found that Chinese law had *not* required Respondents' anticompetitive conduct. At trial, a jury found for Petitioners, and found in a special verdict that Respondents' conduct had been voluntary, rather than compelled.

The Second Circuit held that the District Court's failure to abstain from exercising jurisdiction in the first place was reversible error. The panel's conclusion rested solely on the fact that the Ministry of Commerce of the People's Republic of China ("the Ministry") had appeared before the court as *amicus curiae* and insisted that Chinese law had compelled Respondents to form a cartel, engage in

price fixing and limitations on supply, and thereby violate the Sherman Act. The District Court had respectfully considered the Ministry's position, but determined that it could not be reconciled with overwhelming evidence showing that Respondents and the Chinese Government had contemporaneously described the relevant conduct as voluntary and behaved accordingly. To shield the Ministry from even the slightest judicial scrutiny, the Second Circuit sidestepped the record at trial, reached back to a pre-trial order denying Respondents' motion to dismiss, and held that the District Court abused its discretion by failing to exercise its discretion to abstain under the common law doctrine of international comity.

The panel's decision rests upon two holdings in direct conflict with the law of other Circuits. Both issues warrant review in this Court.

First, the panel improperly exercised jurisdiction over an interlocutory pre-trial order denying Respondents' motion to dismiss, in tension with this Court's decision in *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), and in direct conflict with the holdings of three other Circuits. In *Ortiz*, this Court held that 28 U.S.C. § 1291 does not authorize appellate jurisdiction over pre-trial orders denying summary judgment once there has been a full trial on the merits. *Id.* at 184. Instead, a litigant who seeks appellate review following a trial must preserve and raise pre-trial defenses in Fed. R. Civ. P. 50 motions for judgment as a matter of law. *Ibid.* The *Ortiz* Court did not address whether its decision similarly applies to interlocutory pre-trial motions to dismiss. However, the Sixth Circuit has held that *Ortiz* precludes appellate review of pre-trial motions after a full trial on the merits, and decisions of the Fifth and Tenth Circuits prior to *Ortiz* held the same.

The Second Circuit's decision cannot be reconciled with the rule followed in its sister circuits or the reasoning of *Ortiz* itself. By reviewing the District Court's initial pre-trial order denying Respondents' motion to dismiss based upon the pre-trial record, the panel ignored *Ortiz*'s command that the factual record developed over the course of a full trial on the merits may not be wiped away by post-trial judicial fiat. This error was not a harmless procedural mistake—because Respondents failed to preserve their international comity defense in their pre-verdict Rule 50(a) motion, there was no "final decision" over which the panel had appellate jurisdiction to review Respondents' comity defense.

Second, the panel held that the District Court abused its discretion by declining to defer to the assertion in the Ministry's amicus brief that Respondents' conduct was compelled. The panel acknowledged that the District Court had carefully and thoughtfully weighed the record evidence relating to the voluntariness of Respondents' conduct, including several statements and materials from the Ministry itself. The panel did not conclude that the District Court had erred in *how* it weighed this evidence, but instead held that the entire exercise was an abuse of discretion because the Ministry had appeared in the litigation. According to the Second Circuit, that appearance *by itself* meant that the District Court was "bound to defer" to the Ministry's interpretation. The Second Circuit's rule of deference-on-appearance aligns with that of the Ninth Circuit, and conflicts with the deference standards applied to the legal statements of foreign sovereigns in the Fifth, Sixth, Seventh, Tenth, Eleventh and D.C. Circuits. Absent clear guidance from this Court, foreign sovereigns and opposing litigants will

be left to navigate a patchwork of inconsistent federal rules, and the lower courts will lack certainty regarding the scope of their authority over foreign legal questions under Fed. R. of Civ. P. 44.1.

The Second Circuit's deference standard threatens to undermine the federal antitrust laws by issuing a "get out of jail free" card to any foreign defendant whose home government comes to its defense. A foreign government's views about whether its laws required a defendant to engage in anticompetitive conduct are certainly entitled to respect, but the measure of that respect should not require a district court to ignore all contrary evidence simply because the foreign government appears as *amicus curiae*. By requiring deference to foreign government statements at the motion-to-dismiss stage, regardless of what the record evidence shows, the panel has drawn a road-map for foreign cartels to violate U.S. law with impunity.

A final question also warrants this Court's review. The panel's decision incorrectly answered an important question that this Court left unanswered in *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993)—namely, whether the doctrine of international comity authorizes case-by-case abstention from exercising otherwise valid jurisdiction under the Sherman Act. This Court has never approved of the comity-inspired abstention doctrine on which the panel relied. To the contrary, the Court rejected as "too complex to prove workable" a similar case-by-case abstention approach to the Foreign Trade Antitrust Improvements Act (FTAIA). *F. Hoffman-La Roche Ltd.* v. *Empagran*, 542 U.S. 155, 168 (2004). Despite the reasoning of *Empagran*, the opinion below held that

the application of the antitrust laws to foreign conduct is a matter for case-by-case judicial discretion, rather than a question that Congress has answered by statute. This Court should grant certiorari to clarify that the panel's discretionary ten-factor balancing test is not a valid basis for abstaining from the exercise of federal jurisdiction.

STATEMENT OF THE CASE

Respondents are two Chinese vitamin C manufacturers and exporters who, along with several co-conspirators, "fixed prices and agreed on output restrictions" in violation of U.S. antitrust laws. App. 56a. Respondents have not disputed these facts, nor have they contested that the U.S. antitrust laws validly applied to their extraterritorial conduct. App. 6a, 14a, 56a, 163a. Instead, Respondents have claimed that they are immune from liability because Chinese law compelled their anticompetitive conduct. App. 163a.

At the motion-to-dismiss stage, the District Court declined to afford binding deference to the Ministry's interpretation of Chinese law, which was presented in the form of an unsworn amicus brief. The court's decision was informed in part by the underlying legal documents cited by the Ministry, and in part by the "plain language of the documentary evidence submitted by plaintiffs [which] directly contradicts the Ministry's position." App. 181a. The panel held that the District Court's "careful and thorough treatment of the evidence before it . . . would have been entirely appropriate" had the Chinese Government "not appeared in this litigation." App. 30a n.10. In conflict with the standards of review applied in most other circuits, however, the panel held that the Ministry's appearance

as an amicus transformed a "careful and thorough treatment" into an abuse of discretion.

1. Respondents are members of the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("the Chamber") and its "Vitamin C Subcommittee." App. 56a. Like similar Chinese chambers of commerce established in the 1980s as China began its transition to a market economy, the Chamber is a private "social organization" with a mix of private and public functions. App. 58-59a.

The Ministry is China's "highest authority . . . authorized to regulate foreign trade." App. 6a. In 1997, the Ministry promulgated regulations (the "1997 Notice") setting export quotas for vitamin C, requiring licenses for the export of vitamin C, and directing the Chamber to improve its coordination on vitamin C exports. App. 62a. The 1997 Notice also required the Chamber to establish a "Vitamin C Subcommittee" and required all vitamin C exporters to participate in the Subcommittee. App. 62a. Finally, the 1997 Notice directed the Vitamin C Subcommittee to establish a minimum export price of its own choosing. App. 62a-63a. The Vitamin C Subcommittee determined that it would punish those Subcommittee members who departed from the agreed-upon price through various escalating means, the most serious of which was by revoking their Subcommittee membership and then recommending that the Ministry revoke the offending company's license to export vitamin C. App. 63a.

This export regime lasted for five years. By the end of 2001, Chinese vitamin C manufacturers and exporters had taken advantage of low domestic production costs and

"captured over 60% of the worldwide market for vitamin C," and China's "share of vitamin C imports to the United States" had reached 80%. App. 159a.

In 2001, China became a member of the World Trade Organization ("WTO"), and instituted fundamental changes to its vitamin C export regime "in order to accommodate the new situations since China's entry into WTO." App. 172a. As one of its first policy changes upon accession to the WTO, the Ministry repealed the 1997 Notice, including its requirement that along with other regulations had imposed export license and quota requirements on the vitamin C industry. App. 64a. In its place, the Ministry instituted an export regime known as Price Verification and Chop ("PVC"), in order to keep Chinese exports (including vitamin C) clear of WTO anti-dumping concerns. App. 65a-66a. In the post-2002 regime, vitamin C exports were "no longer subject to supervision and review by customs." App. 65a. Instead, the Chamber was supposed to review an export contract, ensure that it complied with applicable industry standards, and then affix a "chop"—a stamp—to the contract to signal its compliance. App. 65a. If an export contract lacked a proper "chop," Chinese customs was to forbid the goods from leaving China. App. 65a-66a. At trial it was shown that only a handful of vitamin C contracts for sales in the U.S. were subject to this procedure. App. 244a-245a.

During this transition to a new regulatory scheme for vitamin C exports, Respondents and several other vitamin C manufacturers began their anticompetitive activities. App. 78a-82a. Over the next several years, Respondents and their fellow cartel members attended meetings facilitated by the Chamber and voluntarily

agreed to fix export prices and volumes, including for export to the United States. App. 82a-93a. The cartel was able to maintain prices "substantially above competitive levels." App. 161a. The cartel—acting at Subcommittee meetings—also repeatedly agreed to restrict vitamin C export volumes, even agreeing to shut down production at certain times to limit supply and fend off price drops. App. 161a-162a.

By the time this case reached the motion-to-dismiss stage, the record overwhelmingly showed that the Chinese government had not compelled Respondents to fix prices after 2001. App. 173a-179a. That evidence included public pronouncements from the Chinese Government regarding its deregulation of vitamin C prices, App. 173a, direct statements from Respondents describing the voluntary association that they had joined, App. 176a, evidence that certain Respondents had sold vitamin C at prices that were multiples above the mandatory price point they contended existed, App. 175a-176a, and even statements from Respondents showing that the entire notion of a "compulsion" defense had been manufactured for litigation purposes, App. 178a.

2. On January 26, 2005, Petitioners filed a complaint in the Eastern District of New York against Respondents and several other defendants, alleging Sherman Act violations. App. 88a. The Judicial Panel on Multidistrict Litigation consolidated two other actions with that complaint before the late Judge Trager. App. 157a-158a.

Respondents moved to dismiss the complaints, arguing that Petitioners' claims were barred by the doctrines of foreign sovereign compulsion, act of state,

and international comity because their allegedly anticompetitive conduct had been compelled by Chinese law. App. 163a. The legal authority on which Respondents' arguments rested was an amicus brief filed by the Ministry, which argued that Chinese law had compelled Respondents' conduct. App. 212a, 217a, 221a. Respondents argued that the court was obliged to accept the Ministry's amicus brief "as true, because it [contained] the official position of the government of China." App. 168a. Notably, the brief did *not* claim that the Chinese legal system recognizes the Ministry of Commerce as an authoritative interpreter of Chinese law. App. 189a-223a.

Judge Trager denied the motion to dismiss following limited discovery on November 6, 2008. App. 188a. Judge Trager explained that the standard of deference due to the Ministry's amicus brief was dispositive to his decision, because the legal documents attached to the Ministry's brief suggested "on their face that defendants' acts were voluntary rather than compelled." App. 179a. Surveying the applicable precedents following the adoption of Fed. R. Civ. P. 44.1, Judge Trager concluded that the Ministry's legal interpretation did not have to be treated as "conclusive," but was entitled to "substantial deference." App. 181a. Applying that standard, Judge Trager concluded that the record "was simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions," App. 186a, in part based on Respondents' own documents but also based upon "documentary evidence submitted by plaintiffs [that] directly contradict[ed] the Ministry's position." App. 181a. Judge Trager reasoned that further discovery would shed light on the question whether Respondents' actions in coordinating pricing were voluntary or mandatory. App. 186a & n.12.

Respondents sought to certify the order denying their motion to dismiss for interlocutory appeal, but Judge Trager denied the request. App. 225a-226a, 232a.

3. Following the conclusion of discovery, Respondents moved for summary judgment, again arguing that "they were compelled by the Chinese government to fix prices," and that the case should be dismissed based upon the same three doctrines raised in their motion to dismiss. App. 55a.[1]

The District Court denied the motion for summary judgment. App. 56a. With respect to Respondents' comity defense,[2] the court held that the "continuing validity" of the *Timberlane* "comity balancing test"[3]—a ten-factor test developed by the Ninth and Third Circuits to guide case-by-case abstention in Sherman Act cases involving extraterritorial conduct—was "unclear after the Supreme Court's decision addressing comity in *Hartford Fire*." App. 100a. Applying *Hartford Fire*, the court held that

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1. By this time, Judge Trager had passed away, and the consolidated action had been reassigned to Judge Brian M. Cogan. App. 58a.

2. The District Court rejected the defense of foreign sovereign compulsion because Respondents had failed to meet their burden to prove that their anticompetitive conduct was "compelled" with the threat of "penal or other severe sanctions." App. 102a-104a. The District Court further held that the act of state doctrine did not apply because the case did not require the court to inquire into the legality or validity of a foreign sovereign's official act. App. 108a-116a.

3. App. 15a-16a; *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1977).

regardless of the continuing viability of the *Timberlane* factors, "unless [Respondents'] price-fixing was compelled by the Chinese government, dismissal on comity grounds would not be justified." App. 102a.

To decide whether Chinese law actually compelled Respondents' conduct, the District Court considered the Ministry's motion-to-dismiss-stage amicus brief, as well as a subsequent 2009 Ministry statement about the regulatory regime governing Chinese vitamin C exports. App. 118a-122a. The court found that the Ministry's statements were entitled to respect, and deferred to the Ministry's "explanation of the relationship between the Ministry and the Chamber," App. 118a-119a & n.37. But the court concluded, "based on what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the [Vitamin C] Subcommittee and the Chamber—that the [post-2001] regime did not compel [Respondents'] conduct." App. 118a-119a.

The District Court found that the high-level legal conclusions advanced in the Ministry's amicus brief contained gaps and ambiguities, and failed to address "critical provisions" of the relevant legal regime. App. 119a. As Judge Trager had found at the motion-to-dismiss phase, Judge Cogan found that certain of the Ministry's statements were directly contradicted by the documentary evidence relating to compulsion before the court. App. 121a-122a. For example, the court pointed to language on the Chamber's website and in other public materials stating that the vitamin C industry's price coordination was the product of "self-restraint," arrived at "voluntarily," "*without any government intervention*,"

and "*completely implemented by each enterprise's own decisions.*" App. 79a-81a (emphasis added).

Finally, while noting that this was "not dispositive on the question of the appropriate deference to be afforded to statements by foreign governments," the District Court held that because the "alleged compulsion [was] in [Respondents'] own self-interest, a more careful scrutiny of [the Ministry's] statement [was] warranted." App. 121a. The court concluded that the Ministry's legal position appeared to be an "attempt to shield [Respondents'] conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question." App. 121a-122a. Applying Rule 44.1 to the summary judgment record, the court held that Respondents had not demonstrated that Chinese law in fact compelled Respondents' particular anticompetitive conduct and rejected Respondents' comity defense. App. 56a.

4. The case proceeded to trial. During the course of a three-week trial, the jury heard testimony from the head of the Vitamin C Subcommittee, Qiao Haili, who claimed there was government compulsion. The jury then heard deposition testimony in which Mr. Qiao said it was "accurate" that "export prices are fixed by enterprises *without* government intervention." App. 295a (emphasis added) Mr. Qiao further admitted that "on the whole, the government did not involve itself in price fixing," and that after 2002, no price limitations or agreements on export quantities went forward without the support of the majority of the vitamin C manufacturers. App. 295a. Mr. Qiao even confirmed that it was "perfectly acceptable" for the companies to decide to have *no minimum prices at*

all, App. 296a, and that no vitamin C company was ever punished for charging less than the minimum price, App. 249a. In July 2003, Mr. Qiao wrote a memo to the Ministry that showed that the compulsion defense in this case was never true; at trial he denied the memo was about vitamin C, and was shown to have fabricated his testimony.

After the close of evidence, Respondents made an oral motion for judgment as a matter of law under Fed. R. Civ P. 50(a). App. 250a. Respondents' Rule 50(a) motion did not move for judgment as a matter of law on the basis of comity. App. 250a-275a. Instead, the motion raised three defenses: first, the sufficiency of the evidence to establish Respondent North China Pharmaceutical Group Corp.'s liability, App. 256a-258a; second, the act of state doctrine, App. 253a-255a; and third, the doctrine of foreign sovereign compulsion, App. 256a. The court reserved decision on the first ground and denied judgment as a matter of law on the latter two. App. 273a-275a.

After the jury returned a verdict for Petitioners, App. 276a-279a, Respondents moved again for judgment as a matter of law, this time under Rule 50(b). This time, Respondents also raised the independent ground that international comity required dismissal of Petitioners' suit. App. 41a. The court denied the motion on all grounds. App. 53a.

5. The Court of Appeals did not rule on Respondents' Rule 50(b) motion, but instead reviewed Judge Trager's 2008 order denying Respondents' initial motion to dismiss, reversed that order, vacated the jury verdict, and remanded with instructions to enter judgment dismissing Petitioners' complaint with prejudice. App.

3a. The court did so relying solely on the grounds that comity required the court to abstain from adjudicating Petitioners' claims, and without explaining the basis for its appellate jurisdiction over Respondents' pre-trial motion to dismiss.[4]

The Second Circuit held that "exercising jurisdiction over antitrust violations that occur abroad" raises "unique international concerns" requiring federal courts to consider whether comity bars the exercise of jurisdiction—even where the Sherman Act indisputably reaches the foreign conduct, and entirely separate from any inquiry involving the defense of foreign sovereign compulsion. App. 14a-15a. The court explained that "[t]o determine whether to abstain from asserting jurisdiction on comity grounds," it would "apply the multifactor balancing test set out in" *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1977) (seven factors) and supplemented by *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (ten factors). App. 14a-15a.

The first of those "*Timberlane* factors," the Second Circuit explained, required the court to determine whether there was a "true conflict" between U.S. and Chinese law. App. 16a. The Second Circuit reasoned that "if Chinese law required [Respondents] to enter into horizontal price-fixing agreements," a "true conflict" would exist between U.S. and Chinese law, even if

4. At no time in their merits briefing before the Second Circuit did Respondents urge reversal of the order denying their initial motion to dismiss. Instead, Respondents simply urged reversal of the District Court's Rule 50(b) order.

Respondents entered into different horizontal price-fixing agreements than the agreements that Chinese law required. App. 19a. The panel explicitly held that the District Court erred in even *considering* factual material—available at both the motion-to-dismiss record and on summary judgment—that contradicted the Ministry's claim that Chinese law compelled Respondents' conduct. App. 32a ("We are disinclined to view this factual evidence of China's unwillingness or inability to enforce the PVC regime as relevant to the PVC regime's legal mandate."); App. 32a-33a ("Even if [Respondents'] specific conduct was not compelled by the 2002 Notice, that type of conflict is not required for us to find a true conflict between the laws of the two sovereigns. . . . Whether [Respondents], in fact, charged prices in excess of those mandated by the 2002 Notice does not weigh heavily into our consideration of whether the PVC regime, *on its face*, required [Respondents] to violate U.S. antitrust laws in the first instance.") (emphasis added).

The Second Circuit held that Judge Trager had abused his discretion by failing to defer to the Ministry's amicus brief at the motion-to-dismiss stage. App. 37a. The panel held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction *and effect* of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court *is bound* to defer to those statements."[5] App. 25a (emphasis added). Notwithstanding

5. Although the Second Circuit referred to a "sworn evidentiary proffer," no such "sworn" proffer was ever before the District Court, including when Judge Trager denied Respondents'

its nod to a reasonableness standard, the panel made clear that the bare fact of the Ministry's appearance as *amicus curiae* was dispositive: "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required *at both the motion to dismiss and summary judgment stages would have been entirely appropriate.*" App. 30a n.10 (emphasis added). In sum, because the Ministry appeared in the litigation, the District Court was "bound to defer" to the Ministry's assertions regarding *both* the construction and effect of Chinese law regardless of any contrary record evidence. App. 25a. Thus, based solely upon the Ministry's appearance, the panel accepted as binding the Ministry's assertion that there was a "true conflict" between the Sherman Act and Chinese law, applied the remaining *Timberlane* factors, and concluded that comity barred Petitioners' suit.

Petitioners moved for panel rehearing and rehearing en banc, arguing *inter alia* that the District Court's order denying Respondents' motion to dismiss was "not reviewable" under this Court's decision in *Ortiz* v. *Jordan*, 562 U.S. 180 (2011). App. 291a. The petition for rehearing was the first point at which Petitioners could have raised this argument, because Respondents did not request appellate review of the District Court's pre-trial order denying their motion to dismiss in their briefs before the Second Circuit. The Second Circuit denied the petition, and this petition for certiorari followed.

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motion to dismiss. Instead, as Judge Trager himself noted, the Ministry had merely filed an amicus brief signed by its counsel, who had entered into a joint defense agreement with Respondents. App. 230a-232a, 237a-238a.

REASONS FOR GRANTING THE PETITION

A. The Panel Erred in Exercising Jurisdiction Over a Pre-Trial Order Denying a Motion to Dismiss, Creating a Clear Split with Three Other Circuits.

1. The Court of Appeals decision to review and reverse the District Court's 2008 interlocutory order denying Respondents' motion to dismiss—ignoring Respondents' post-trial Rule 50 motion—creates a split with three other circuits regarding the scope of appellate jurisdiction over pre-trial motions to dismiss.

Under 28 U.S.C. § 1291, the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." In *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), this Court interpreted § 1291 to preclude a party from appealing an order denying summary judgment after a trial on the merits, because the order "retains its interlocutory character as simply a step along the route to final judgment." *Id.* at 184. The Court explained that after a trial, "the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ibid.* The decision in *Ortiz* was unanimous for the proposition that "a party ordinarily cannot appeal an order denying summary judgment after a full trial on the merits," and a court of appeals "lack[s] jurisdiction to review" such an order). *Id.* at 192 (Thomas, J., concurring in judgment).

Following *Ortiz*, the clear majority view is that pre-trial orders denying motions to dismiss, like motions denying summary judgment, may not be reviewed following trial. Instead, the Fifth, Sixth, and Tenth Circuits have held

that pre-trial motions to dismiss retain their interlocutory character, and that an unsuccessful moving party must renew its arguments in Rule 50 motions to raise them on appeal. *See Nolfi* v. *Ohio Ky. Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012) (holding that *Ortiz* "precludes . . . consideration of appeal from the district court's denial of [a] motion to dismiss"); *ClearOne Commc'ns, Inc.* v. *Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011) (holding that "a defendant may not, after a plaintiff has prevailed at trial, appeal from the pretrial denial of a Rule 12(b)(6) motion to dismiss, but must instead challenge the legal sufficiency of the plaintiff's claim through a motion for judgment as a matter of law"); *Bennett* v. *Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) dismissal becomes moot."); *In re Gollehon*, No. CO-14-031, 2015 WL 1746496, at *5 (B.A.P. 10th Cir. Apr. 17, 2015) ("Perhaps at some point in the future, the Tenth Circuit will definitively rule that in limited instances a denial of a motion to dismiss is appealable following trial and final judgment. But until such time, we decline to push that boundary . . . ."). The decision below creates a split with the Fifth, Sixth, and Tenth Circuits on the question whether 28 U.S.C. § 1291 confers jurisdiction to review an interlocutory order denying a motion to dismiss following a trial on the merits.[6]

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6. There is a further split of authority—not implicated here—regarding appellate jurisdiction to review "purely legal" questions that are raised in a pretrial motion but not preserved in post-trial Rule 50 motions. *See Feld* v. *Feld*, 688 F.3d 779, 781-783 (D.C. Cir. 2012) (collecting cases). Whatever may be the merits of the "controversial" exemption for "purely legal" questions, *see Empress Casino Joliet Corp.* v. *Balmoral Racing Club, Inc.*, 831 F.3d 815, 824 (7th Cir. 2016), it is inapplicable here

2. The question presented warrants review in this Court. The jurisdictional limits imposed by 28 U.S.C. § 1291 promote the objectives of judicial economy and finality. Permitting appellants to re-litigate any pre-trial interlocutory order outside of the context of Rule 50 motions would "enable litigants to extend" their dispositive objections in the district court "simply by adoption of the expedient of an appeal." *Cone* v. *W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947). "Congress, in enacting present §§ 1291 & 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a 'final decision' for appeal in every case, and has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship." *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 746 (1976). And litigants have "ample" opportunity to raise any argument raised in a motion to dismiss via an order that *is* final. *Ibid.*

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because Respondents' motion to dismiss raised a comity defense that the panel itself conceded is not a "purely legal" question, but rather involves the application of a ten-factor test including factual considerations. App. 34a; *see GAMCO Inv'rs, Inc.* v. *Vivendi Universal, S.A.*, 838 F.3d 214, 223 n.5 (2d Cir. 2016) (a court of appeals does not have jurisdiction to review an order denying summary judgment where factual issues contributed to the grounds for denial); *see also Drexel Burnham Lambert Grp. Inc.* v. *Galadari*, 777 F.2d 877, 881 (2d Cir. 1985) (international comity analysis requires factual development); *Pan E. Expl. Co.* v. *Hufo Oils*, 798 F.2d 837, 839 (5th Cir. 1986) ("the considerations necessary to decide whether to extend comity" are "inextricably bound with the facts relevant to the merits").The panel's "true conflict" analysis was central to its decision, but that was only *one* of ten factors the court considered. Notably, in *Timberlane* itself, the Ninth Circuit reversed the district court's pretrial *dismissal* of the plaintiff's claims, noting that "the Supreme Court has expressed disapproval of summary disposition in this type of case." *Timberlane*, 549 F.2d at 602.

3. This case presents an ideal vehicle to consider the question presented. The panel's conclusion that it had appellate jurisdiction over Respondents' motion to dismiss was dispositive of its consideration of the comity defense, because that defense was not properly preserved in Respondents' motion for judgment as a matter of law. Before the case was submitted to the jury, Respondents failed to raise their comity defense in their Rule 50(a) motion. App. 250a-275a. Under clearly established Second Circuit law, Respondents' failure to raise comity as a defense in their pre-verdict Rule 50(a) motion barred them from seeking relief on that ground in their post-verdict Rule 50(b) motion, and on any appeal from the order denying that motion. *Lore* v. *City of Syracuse*, 670 F.3d 127, 152-53 (2d Cir. 2012) ("In order for a party to pursue a request for JMOL on appeal, the party must have made timely motions for JMOL in the district court. . . . A Rule 50(a) motion requesting judgment as a matter of law on one ground but omitting another is insufficient to preserve a JMOL argument based on the latter. . . . Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. . . .") (citations omitted).

The panel's review of Respondents' comity defense was permissible if, and only if, 28 U.S.C. § 1291 permits review of a pre-trial motion to dismiss that has not been properly incorporated into a Rule 50 motion following trial. That precise question is the subject of the split described above. This Court should grant certiorari to provide needed guidance to the courts of appeals.

B. The Second Circuit's Rigid Standard of Deference to Foreign Sovereign Statements Deepened an Important Circuit Split.

1. The holding at the core of the panel's decision—that a court is "bound to defer" to a foreign governmental entity's interpretation of its domestic law when that entity appears in the litigation—conflicts directly with the rules applied in at most other circuits and exacerbates widespread disarray regarding the proper standard of deference to foreign sovereigns in the context of Rule 44.1.

In *United States* v. *Pink*, 315 U.S. 203 (1942), this Court concluded that an interpretation of a Russian decree offered in the form of an "official declaration" by a Russian official who had the legal authority to "interpret existing Russian law" was "conclusive" with respect to the question of the decree's extraterritorial effect under Russian law. Since the adoption of Fed. R. Civ. P. 44.1 in 1966, the courts of appeals have diverged over whether and how to apply *Pink*'s "conclusive" formulation to legal statements offered by foreign sovereigns who participate in U.S. litigation as parties or amici. The Sixth and D.C. Circuits, in direct conflict with the decision below, have declined to defer to appearing sovereigns' interpretations of their domestic laws, while the Fifth, Seventh, and Eleventh Circuits each applies its own flexible standard of deference taking into account a variety of factors that would have counseled against deference here. Meanwhile, the opinion below aligned the Second Circuit with the Ninth Circuit's decision in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1471,1474 & n.7 (9th Cir. 1992), which reflexively deferred to an interpretation of Chinese law proffered by a corporate "arm of the

[Chinese] government," *id.* at 1471. In sum, the Ministry's amicus brief could have been subjected to any one of at least three different standards of deference applied by the courts of appeals, the selection of which would likely have been outcome determinative.

The standard of deference applied by the Court of Appeals conflicts directly with the standard applied by the D.C. Circuit. In *McKesson Corp.* v. *Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012), the D.C. Circuit held—over Iran's objections—that Iranian law afforded plaintiffs with a private right of action that would allow their suit to proceed against Iran in U.S. federal court. *Id.* at 1078-82; see also *McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001), (exercising Rule 44.1 authority to interpret Iranian law, rejecting Iran's interpretation of Iranian law, and adopting a different interpretation based on evidence in the record including Iran's own proffered evidence and legal materials); *McKesson Corp.* v. *Islamic Republic of Iran*, 753 F.3d 239, 242-243 (D.C. Cir. 2014) (conducting a Rule 44.1 analysis later in the same litigation, and this time *agreeing* with Iran's interpretation of its own laws as to attorney's fees). At no point in the *McKesson* litigation did the D.C. Circuit defer to Iran's proffered interpretation of its own laws. The D.C. Circuit has elsewhere expressed its skepticism that applying a rule of deference to foreign legal interpretations would be consistent with Rule 44.1. *Riggs Nat'l Corp. & Subsidiaries* v. *Comm'r of Internal Revenue Serv.*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) ("We are . . . hesitant to treat an interpretation of law as an act of state, for such a view might be in tension with rules of procedure directing U.S. courts to conduct a *de novo* review of foreign law when an issue of foreign law is raised") (citing Fed. R. Civ. P. 44.1).

The Sixth Circuit has also declined to require deference to foreign sovereigns appearing in litigation. In *Chavez* v. *Carranza*, 559 F.3d 486 (6th Cir. 2009), the Sixth Circuit rejected the arguments in an amicus brief filed by the Republic of El Salvador, and affirmed a jury verdict holding Nicolas Carranza liable under the Alien Tort Statute and the Torture Victims Protection Act for atrocities committed in El Salvador by Salvadoran Security Forces. Invoking international comity, Carranza had protested at trial that the Salvadoran Amnesty Law, an important element of the peace accords that ended eleven years of civil war, "preclud[ed] criminal or civil liability for political or common crimes committed" prior to the signing of the peace accords. *Id.* at 490, 494-95. On appeal, the Republic of El Salvador filed an amicus brief in which it argued that the judgment below constituted "an unwarranted intrusion into the sovereign affairs of another nation" and "undermine[d] the very vehicle of El Salvador's transformation." Brief of the Republic of El Salvador as Amicus Curiae at 4-5, *Chavez* v. *Carranza*, No. 06-6234 (6th Cir. Apr. 18, 2008). The Sixth Circuit rejected the notion that it was bound to defer to El Salvador's amicus brief—instead, it ignored El Salvador's arguments and concluded that the Amnesty Law did not preclude the plaintiffs' suit. *Chavez*, 559 F.3d at 495-96.

Three other circuits apply standards of deference that are far more searching than the panels' "bound to defer" approach.

The Eleventh Circuit has held that the "initial foreign law determination . . . is a question of law for the court," (under Fed. R. Crim. P. 26.1, a parallel provision to Fed. R. Civ. P. 44.1), and that although it is "logical" to "assume

that statements from foreign officials are a reliable and accurate source" of authority on foreign law, a court is not bound to defer to those statements when the foreign nation's official position has changed. *United States* v. *McNab*, 331 F.3d 1228, 1241 (11th Cir. 2003). In reaching its conclusion, the court rejected an amicus brief filed by the Honduran government arguing that the defendants "violated no Honduran law," and that the court's refusal to accept this interpretation would violate "the international principles of comity which require nations to give deference to the laws and procedures of other sovereign states." Brief Amicus Curiae of the Embassy of Honduras at 8, 32, *United States* v. *McNab*, 2002 WL 32919784 (11th Cir. June 6, 2002).

The Fifth Circuit "recognizes the difficulty" that may arise in the course of adjudicating Rule 44.1 questions, and has held that "courts *may* defer to foreign government interpretations." *Access Telecom, Inc.*, v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (emphasis added). That rule of permissive deference includes important caveats that would have made a difference in this case. For example, in *Access Telecom*, the court refused to defer to an interpretation of Mexican law proffered by a Mexican administrative agency, in part because of ambiguities in the agency's proffered interpretation, and in part because "the evidence . . . [did] not persuasively show that the [Mexican agency] was empowered to interpret Mexican law" in the first place. *Ibid.*

Finally, the Seventh Circuit holds that federal courts owe "substantial deference to the construction [a foreign sovereign] places on its domestic law." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

Accordingly, the Seventh Circuit deferred to a foreign sovereign's proffered interpretation of its domestic law in circumstances where 1) the sovereign government (France) appeared in federal court and 2) offered a view of its law that was both plausible and consistent with its stated views through many years of domestic and international litigation on the subject in question. *Id.* at 1312-13.

2. It is vitally important that the federal courts apply a consistent and coherent standard of deference to interpretations of foreign law offered by foreign sovereign governments. Clarity and uniformity are essential where judicial rules govern the treatment of foreign sovereigns in federal court. *Cf. Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2086 (2015) (noting the importance of a "single policy regarding which governments are legitimate in the eyes of the United States and which are not" and stressing that assurances regarding the treatment of foreign sovereigns in U.S. courts "cannot be equivocal"). Uniformity is particularly important given the frequency with which modern foreign sovereigns appear as litigants in U.S. courts—inconsistent treatment of foreign sovereign statements creates a potential for diplomatic conflicts and risks forum shopping. Litigants and judges should understand the rules that govern the interpretation of foreign law, and those rules should not depend upon the Circuit that ultimately has jurisdiction over a given claim.

This question is also important to ensure the consistent application of U.S. antitrust laws to foreign conduct. As illustrated by multiple guilty pleas, criminal fines, and prison sentences in the 1990s, European manufacturers F. Hoffmann La Roche, Ltd. of Switzerland, Merck KgaA

and BASF AG of Germany, Takeda Chemical Industries, Ltd. of Japan, and other companies around the world formed one of the world's largest and most infamous illegal cartels to suppress competition and fix prices for a range of vitamins, including vitamin C.[7] Under the panel's approach, all of that prosecuted conduct, and other conduct like it, would be immunized in any country whose government chose to appear in U.S. court and assert that their law compelled the anticompetitive conduct. As the Eleventh Circuit warned in rejecting a rule of binding deference to foreign sovereign legal statements, "it is not difficult to imagine a . . . defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials" to alter the foreign law at issue in order to immunize him from liability in the United States. *McNab*, 331 F.3d at 1242. "Such a scenario would completely undermine the purpose" of the U.S. laws at issue. *Id.*

Further percolation is unwarranted. *Pink* was decided three-quarters of a century ago, and Rule 44.1 has been on the books for nearly as long. The divergent approaches of the circuits have been afforded adequate time to develop, and continued confusion threatens to undermine U.S. law and introduce needless complications into foreign relationships. Other countries may question why China's Commerce Ministry has received more favorable treatment from U.S. courts than, for example, Mexico's Secretary of Communications and Transportation. *See Access Telecom*,

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7. *See* U.S. Dep't of Justice Press Release Dated May 20, 1999, https://www.justice.gov/archive/atr/public/press_releases/1999/2450.htm; Victoria Broadbent, *Vitamin Companies Back in Court*, BBC News (Feb. 7, 2013), http://news.bbc.co.uk/2/hi/business/2737835.stm.

197 F.3d at 702. The danger of inconsistency is particularly acute in the antitrust context, where the United States maintains complex relationships with foreign trading partners that are undermined by warring judicial rules.

3. This case presents an ideal vehicle to consider this recurring question. The standard of deference owed to the Ministry's amicus brief was dispositive to the outcome of the litigation. The District Court understood this. App. 179a ("The authority of the Ministry's brief is critical to defendants' motion, because . . . the documents on which defendants rely to demonstrate governmental compulsion of their anti-competitive acts suggest on their face that defendants' acts were voluntary rather than compelled"). So, too, did the Second Circuit. App. 30a n.10. ("[I]f the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate."). But for the Second Circuit's deference to the Ministry's brief, the jury's verdict would not have been disturbed.

C. This Court Should Clarify Whether Courts Have Discretionary Authority to Abstain from Otherwise Valid Sherman Act Jurisdiction over Foreign Conduct.

1. The merits of this case raise a third question that is of exceptional importance: whether a court may abstain from exercising Sherman Act jurisdiction based upon a case-by-case international comity analysis.

This Court has never countenanced a case-by-case approach to abstention from Sherman Act jurisdiction on international comity grounds. The comity doctrine on which the panel relied first surfaced in the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of Am.*, 549 F.2d 597 (1977), which held that even where the jurisdictional requirements for an extraterritorial application of the Sherman Act are satisfied, international comity provides an independent basis for a U.S. court to decline jurisdiction over a Sherman Act claim. *Id.* at 613-15; *see generally* Areeda & Hovenkamp, Antitrust Law ¶ 273, at 375-83 (4th ed. 2013). *Timberlane* thus created an exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *see* Areeda & Hovenkamp ¶ 273, at 378 ("The distinctive holding of *Timberlane* is that notwithstanding sufficient effects and an antitrust violation, the court may still decline to assert its extraterritorial jurisdiction" on the basis of its multi-factor comity test); *id.* ¶ 273 at 359-60 (following *Timberlane*, "several lower courts . . . expressly acknowledge a judicial discretion to decline to exercise the jurisdiction conferred").[8]

In *Hartford Fire*, this Court reserved decision on the question whether international comity is *ever* an appropriate basis for abstention from otherwise valid Sherman Act jurisdiction. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993) ("[E]ven assuming that in a proper case a court may decline to exercise

8. The panel explicitly relied upon *Timberlane*'s formulation of the comity test, as supplemented in *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). App. 34a.

Sherman Act jurisdiction over foreign conduct . . . international comity would not counsel against exercising jurisdiction in the circumstances alleged here."). In *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), this Court rejected the contention that courts should take "account of comity considerations case by case, abstaining where comity considerations so dictate." *Id.* at 168. The Court explained that such an approach was "too complex to prove workable," requiring courts "to examine how foreign law, compared with American law, treats not only price fixing but" countless other anticompetitive arrangements, "in respect to both primary conduct and remedy." *Ibid.* Instead, this Court adopted a uniform, predictable comity-inspired rule, interpreting the FTAIA to exclude cases "where foreign injury is independent of domestic effects" from federal antitrust jurisdiction across the board. *Id.* at 169. With respect to cases like the present one, in which substantial domestic effects have been established, *Empagran* recognized that "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165.

It is unclear whether the *Timberlane* test remains appropriate following *Empagran*'s rejection of case-by-case abstention. *Empagran*, not *Timberlane*, is more consistent with the historic approach to comity in the Sherman Act context. Writing for a Second Circuit panel that sat as a court of last resort, Judge Learned Hand acknowledged that principles of comity should inform a court's interpretation of the Sherman Act's "general

words." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). But when deciding whether the Sherman Act reached foreign conduct, the courts are "concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it." *Ibid.* *Empagran* reaffirmed *Alcoa*'s approach. *Empagran*, 542 U.S. at 165-69. So too did *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), which rejected a case-by-case approach to the extraterritoriality of § 10(b) of the Securities Exchange Act of 1934 in favor of a straightforward exercise in statutory interpretation. *Ibid.* at 261 (holding that the appropriate rule, "[r]ather than [to] guess anew in each case," was to interpret the statute across-the-board against extraterritoriality for *all* cases, thus "preserving a stable background against which Congress can legislate with predictable effects").

The panel's decision is not only at odds with this Court's decisions, it is also out of step with lower court decisions that have treated the extraterritorial limits of Sherman Act jurisdiction as a question of statutory interpretation rather than case-by-case abstention. *See, e.g.*, *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538-39 (8th Cir. 2007) (interpreting the scope of the Sherman Act in light of "prescriptive comity"); *Empagran S.A.* v. *F. Hoffmann-LaRoche Ltd* ("*Empagran II*"), 417 F.3d 1267, 1271 (D.C. Cir. 2005) (same); *Indus. Inv. Dev. Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982) ("We also disagree with [*Timberlane* and other cases'] suggestion . . . that the question whether to entertain the suit is discretionary with the trial judge. A decision not to apply the antitrust laws must be based on solid legal ground; the question is one of interpreting the

scope that Congress intended to give the antitrust laws."), *cert. granted, vacated, and remanded on other grounds*, 460 U.S. 1007 (1983).

2. This question presented is exceptionally important. *Timberlane*'s discretionary abstention doctrine is "cumbersome, often indeterminate, conducive to lengthy and expensive discovery, and thus extremely burdensome to both litigants and courts," and "largely inconsistent" with this Court's own approach in *Empagran*." Areeda & Hovenkamp ¶ 273, at 375. Antitrust class actions are generally lengthy and complex proceedings, and in such actions all parties benefit from clear *ex ante* rules. The existence of a boundless discretionary abstention doctrine that may be applied *sua sponte* at any time from motion to dismiss through appeal interferes with judicial economy and the intended efficiency benefits of multidistrict proceedings.

Review is particularly important given the potential for *Timberlane*'s discretionary test to supplant more precisely defined doctrines. *Timberlane*, as applied to antitrust claims like Petitioners', subsumes clearer defenses to Sherman Act liability such as the defense (also raised and litigated below) of foreign sovereign compulsion. *See, e.g.*, *O.N.E. Shipping Ltd.* v. *Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987). That defense relieves a defendant of Sherman Act liability when it can prove, as a factual matter, that the foreign sovereign compelled the conduct at issue. *See Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979) ("It is necessary that foreign law must have coerced the defendant into violating American antitrust law."); Areeda & Hovenkamp ¶ 274c. Given

the extensive factual record in this case indicating that Respondents were *not* so compelled, *e.g.*, App. 117a, and the jury's factual finding to that effect, App. 278a, the panel could not have ruled for Respondents on grounds of foreign sovereign compulsion. In sum, *Timberlane*'s unbounded discretion allowed the panel to hold that a foreign sovereign compelled Respondents' conduct without bothering to consider the requisite elements of the foreign sovereign compulsion defense.

The *Timberlane* test, as applied by the opinion below, threatens to replace more precisely-defined inquiries and creates virtually unbounded judicial discretion over the extraterritorial application of U.S. antitrust laws. *See, e.g.*, Areeda & Hovenkamp ¶ 273, at 367 ("Indeed, to the extent the federal antitrust laws represent the public economic policy of the United States, there may be little room for considerations of comity at all. Dismissals are rare when there is a substantial effect on American commerce and no act of state or foreign compulsion.") (footnote and emphasis omitted). This Court's decision in *Empagran* casts serious doubt on the propriety of the panel's approach. *Empagran*, 542 U.S. at 165. Review in this Court is warranted to ensure that the extraterritorial reach of U.S. antitrust laws remains a matter decided by statutory text, rather than case-by-case application of a discretionary ten-part test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 3, 2017

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 20, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 13-4791-cv

IN RE: VITAMIN C ANTITRUST LITIGATION;
ANIMAL SCIENCE PRODUCTS, INC.,
THE RANIS COMPANY, INC.,

Plaintiffs-Appellees,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD.,
NORTH CHINA PHARMACEUTICAL GROUP
CORPORATION,

Defendants-Appellants.

August Term 2014

Argued: January 29, 2015

Decided: September 20, 2016

Before: CABRANES, WESLEY, and HALL, Circuit Judges.

Appendix A

OPINION

Hall, *Circuit Judge*:

This appeal arises from a multi-district antitrust class action brought against Defendants-Appellants Hebei Welcome Pharmaceutical and North China Pharmaceutical Group Corporation, entities incorporated under the laws of China. Plaintiffs-Appellees, Animal Science Products, Inc. and The Ranis Company, Inc., U.S. vitamin C purchasers, allege that Defendants conspired to fix the price and supply of vitamin C sold to U.S. companies on the international market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. This appeal follows the district court's denial of Defendants' initial motion to dismiss, *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008) (Trager, *J.*), a subsequent denial of Defendants' motion for summary judgment, *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011) (Cogan, *J.*),[1] and, after a jury trial, entry of judgment awarding Plaintiffs approximately $147 million in damages and enjoining the Defendants from engaging in future anti-competitive behavior. For the reasons that follow, we hold that the district court erred in denying Defendants' motion to dismiss.[2]

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1. District Judge David D. Trager passed away in January 2011, at which point this case was reassigned to District Judge Brian M. Cogan.

2. Because we vacate the judgment and reverse the district court's denial of Defendants' motion to dismiss, we do not address the subsequent stages of this litigation nor the related arguments on appeal.

Appendix A

This case presents the question of what laws and standards control when U.S. antitrust laws are violated by foreign companies that claim to be acting at the express direction or mandate of a foreign government. Specifically, we address how a federal court should respond when a foreign government, through its official agencies, appears before that court and represents that it has compelled an action that resulted in the violation of U.S. antitrust laws. In so doing we balance the interests in adjudicating antitrust violations alleged to have harmed those within our jurisdiction with the official acts and interests of a foreign sovereign in respect to economic regulation within its borders. When, as in this instance, we receive from a foreign government an official statement explicating its own laws and regulations, we are bound to extend that explication the deference long accorded such proffers received from foreign governments.

Here, because the Chinese Government filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin C sold abroad, and because Defendants could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case. Thus, we **VACATE** the judgment, **REVERSE** the district court's order denying Defendants' motion to dismiss, and **REMAND** with instructions to dismiss Plaintiffs' complaint with prejudice.

Appendix A

BACKGROUND[3]

For more than half a century, China has been a leading producer and exporter of vitamin C. In the 1970s, as China began to transition from a centralized state-run command economy to a market economy, the Chinese Government began to implement various export controls in order to retain a competitive edge over other producers of vitamin C on the world market. In the intervening years, the Government continued to influence the market and develop policies to retain that competitive edge. In the 1990s, for example, as a result of a reduction in vitamin C prices, the Government facilitated industry-wide consolidation and implemented regulations to control the prices of vitamin C exports. By 2001, Chinese suppliers had captured 60% of the worldwide vitamin C market.

In 2005, various vitamin C purchasers in the United States, including Plaintiffs Animal Science Products, Inc. and The Ranis Company, filed numerous suits against Defendants, Chinese vitamin C manufacturer Hebei Welcome Pharmaceutical Co. and its holding company, North China Pharmaceutical Group Corporation. These

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3. We set forth here only those facts necessary to resolve the issues on appeal. Unless otherwise noted, the facts have been taken from the allegations in Plaintiffs' Second Amended Complaint, E.D.N.Y. Dkt. No. 1:06-md-1738, Doc. 179, which we accept as true for purposes of resolving a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 109 (2d Cir. 2011). For a more complete recitation of the facts, see the district court's November 6, 2008 Memorandum and Order. *See In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008).

cases were transferred to the Eastern District of New York by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings. The Plaintiffs allege, *inter alia*, that in December 2001 Defendants and their co-conspirators established an illegal cartel with the "purpose and effect of fixing prices, controlling the support of vitamin C to be exported to the United States and worldwide, and committing unlawful practices designed to inflate the prices of vitamin C sold to plaintiffs and other purchasers in the United States and elsewhere." E.D.N.Y. Dkt. No. 1:06-md-1738, Doc. 179 (Second Amended Complaint ("SAC")) ¶ 1. Specifically, Plaintiffs assert that Defendants colluded with an entity that has been referred to in this litigation as both the "Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China" and the "China Chamber of Commerce of Medicines & Health Products Importers & Exporters," (the "Chamber")[4] and agreed to "restrict their exports of Vitamin C in order to create a shortage of supply in the international market." *Id.* ¶ 49. Plaintiffs allege that, from December 2001 to the time the complaint was filed, Defendants, their representatives, and the Chamber devised and implemented policies to address price cutting by market actors and to limit production levels and increase vitamin C prices with the intent to create a shortage on the world market and maintain China's position as a leading exporter. *Id.* ¶ 60.

4. The parties explicitly disagree over the nature and authority of this entity. Plaintiffs characterize this entity as an "association" much like a trade association in the United States, while Defendants describe this entity as a government-controlled "Chamber" of producers, unique to China's state-controlled regulatory regime.

Rather than deny the Plaintiffs' allegations, Defendants instead moved to dismiss on the basis that they acted pursuant to Chinese regulations regarding vitamin C export pricing and were, in essence, required by the Chinese Government, specifically the Ministry of Commerce of the People's Republic of China (the "Ministry"), to coordinate prices and create a supply shortage. Defendants argued that the district court should dismiss the complaint pursuant to the act of state doctrine, the doctrine of foreign sovereign compulsion, and/or principles of international comity. In an historic act, the Ministry filed an *amicus curiae* brief in support of Defendants' motion to dismiss.[5]

In its brief to the district court, the Ministry represented that it is the highest authority within the Chinese Government authorized to regulate foreign trade. The Ministry explained that the Chamber, which Plaintiffs refer to as an "association," is entirely unlike a "trade association" or the "chamber of commerce" in the United States and, consistent with China's state-run economy, is a "Ministry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels." Joint App'x at 153. The Ministry's *amicus* brief describes the Chamber as follows:

> To meet the need of building the *socialist market economy* and *deepening the reform*

5. As Judge Trager noted, the Ministry's appearance in this case is historic because it is the first time any entity of the Chinese Government has appeared *amicus curiae* before any U.S. court. On appeal, the Ministry also appears *amicus curiae* before this Court.

of foreign economic and trade management system, the China Chamber of Commerce of Medicines & Health Products Importers & Exporters was established in May 1989 in an effort to boost the sound development of foreign trade in medicinal products. As a social body formed along business lines and enjoying the status of legal person, the Chamber is composed of economic entities registered in the People's Republic of China dealing in medicinal items as authorized by the departments under the [S]tate Council responsible for foreign economic relations and trade as well as organizations empowered by them. *It is designated to coordinate import and export business* in *Chinese and Western medicines* and provide service for its member enterprises. Its over 1100 members are scattered all over China. The Chamber abides by the state laws and administrative statutes, *implements its policies and regulations governing foreign trade, accepts the guidance and supervision of the responsible departments under the States Council. The very purpose is to coordinate and supervise the import and export operations in this business, to maintain business order and protect fair competition, to safeguard the legitimate rights and interests of the state, the trade and the members and to promote the sound development of foreign trade in medicinal items.*

Joint App'x at 157 n.10 (emphasis in original). According to the Ministry, the Chamber was an instrumentality of the State that was required to implement the Ministry's administrative rules and regulations with respect to the vitamin C trade.[6]

In support of Defendants' motion to dismiss, the Ministry also provided evidence of two Ministry-backed efforts by the Chamber to regulate the vitamin C industry: (1) a vitamin C Subcommittee ("the Subcommittee") created in 1997 and (2) a "price verification and chop" policy ("PVC") implemented in 2002. The Chamber created the Subcommittee to address "intense competition and challenges from the international [vitamin C] market." Joint App'x at 159. Before 2002, only companies that were members of the Subcommittee were allowed to export vitamin C. Under this regime, a vitamin C manufacturer qualified for the Subcommittee and was granted an "export quota license" if its export price and volume was in compliance with the Subcommittee's coordinated export price and export quota. In short, the Ministry explained to the district court that it compelled the Subcommittee and its licensed members to set and coordinate vitamin C prices and export volumes.

In 2002, the Chamber abandoned the "export quota license" regime and implemented the PVC system, which

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6. In an annex to its brief to the district court, the Ministry provided the Mitnick Declaration, which contained a copy of all regulations cited by the Ministry. The Ministry noted that all documents were properly authenticated consistent with Rule 902(3) of the Federal Rules of Evidence, which governs the self-authentication of foreign documents.

the Ministry represented was in place during the time of the antitrust violations alleged in this case. To announce the new regime, the Ministry issued an official notice, a copy of which is attached to the Ministry's brief in support of Defendants' motion to dismiss. This document, hereinafter "the 2002 Notice," explains that the Ministry adopted the PVC regime, among other reasons, "in order to accommodate the new situations since China's entry into [the World Trade Organization], maintain the *order* of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, promote industry self-discipline and facilitate the healthy development of exports." Special App'x at 301. The 2002 Notice, furthermore, refers to "industry-wide negotiated prices" and states that "PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline." Special App'x at 302. According to the Ministry, under this system, vitamin C manufacturers were required to submit documentation to the Chamber indicating both the amount and price of vitamin C it intended to export. The Chamber would then "verify" the contract price and affix a "chop," i.e., a special seal, to the contract, which signaled that the contract had been reviewed and approved by the Chamber. A contract received a chop only if the price of the contract was "at or above the minimum acceptable price set by coordination through the Chamber." Joint App'x at 164. Manufacturers could only export vitamin C if their contracts contained this seal. The Ministry asserted that under the PVC regime, Defendants were required to coordinate with other vitamin C manufacturers and agree on the price that

the Chamber would use in the PVC regime. In short, the Ministry represented to the district court that all of the vitamin C that was legally exported during the relevant time was required to be sold at industry-wide coordinated prices.

Defendants moved to dismiss the complaint based on the act of state doctrine, the defense of foreign sovereign compulsion, and the principle of international comity. The district court (Trager, *J.*) denied the motion in order to allow for further discovery with respect to whether Defendants' assertion that the actions constituting the basis of the antitrust violations were compelled by the Chinese Government. In the district court's view, the factual record was "simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559.

After further discovery, Defendants moved for summary judgment asserting the same three defenses that were the basis for their motion to dismiss. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 525-26. The district court (Cogan, *J.*) considered the evidence submitted by Defendants and the Ministry and accepted the Ministry's explanation as to its relationship with the Chamber, but "decline[d] to defer to the Ministry's interpretation of Chinese law" because the Ministry failed "to address critical provisions" of the PVC regime that "undermine[d] [the Ministry's] interpretation of Chinese law." *Id.* at 551. The district court further reasoned that pursuant to Federal Rule of Civil Procedure 44.1 ("Rule

44.1"), when interpreting Chinese law it had "substantial discretion to consider different types of evidence" beyond the Ministry's official statements, including, for example, the testimony of Plaintiffs' expert witness, a scholar of Chinese law. *Id.* at 561. The district court denied Defendants' motion for summary judgment because it determined that "Chinese law did not compel Defendants' anticompetitive conduct" in any of the relevant time periods. *Id.* at 567.

The case ultimately went to trial. In March 2013, a jury found Defendants liable for violations of Section 1 of the Sherman Act. The district court awarded Plaintiffs approximately $147 million in damages and issued a permanent injunction barring Defendants from further violating the Sherman Act. This appeal followed.

DISCUSSION

The central issue that we address is whether principles of international comity required the district court to dismiss the suit. As part of our comity analysis we must determine whether Chinese law required Defendants to engage in anticompetitive conduct that violated U.S. antitrust laws. Within that inquiry, we examine the appropriate level of deference to be afforded a foreign sovereign's interpretation of its own laws. We hold that the district court abused its discretion by not abstaining, on international comity grounds, from asserting jurisdiction because the court erred by concluding that Chinese law did not require Defendants to violate U.S. antitrust law and further erred by not extending adequate deference

to the Chinese Government's proffer of the interpretation of its own laws.

A. Standard of Review

We review for abuse of discretion a district court's denial of a motion to dismiss on international comity grounds. *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 422 (2d Cir. 2005). An abuse of discretion "occurs when (1) the court's decision rests on an error of law or clearly erroneous factual finding, or (2) its decision cannot be located within the range of permissible decisions." *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 104 (2d Cir. 2016) (alterations and internal quotation omitted). The determination of foreign law is "a question of law, which is subject to *de novo* review." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 80 (2d Cir. 2002) (internal quotation omitted). In determining foreign law, "we may consider any relevant material or source, including the legal authorities supplied by the parties on appeal as well as those authorities presented to the district court below." *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 604 (2d Cir. 1999); *see* Fed. R. Civ. P. 44.1.

B. International Comity

Defendants argue that the district court erred by not dismissing Plaintiffs' complaint on international comity grounds. Comity is both a principle guiding relations between foreign governments and a legal doctrine by

which U.S. courts recognize an individual's acts under foreign law. *See In re Maxwell Commun. Corp.*, 93 F.3d 1036, 1046 (2d Cir. 1996). "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (internal quotations omitted). "[I]t is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* This doctrine "is not just a vague political concern favoring international cooperation when it is in our interest to do so [but r]ather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist.*, 482 U.S. 522, 555, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987). While we approach Defendants' international comity defense from the "legal sense," we do not lose sight of the broader principles underlying the doctrine. *See JP Morgan Chase Bank*, 412 F.3d at 423 ("Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards." (internal quotation omitted)). Our analysis reflects an obligation to balance "the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *In re Maxwell Commun. Corp*, 93 F.3d at 1048.

The principles of comity implicate a federal court's exercise of jurisdiction. *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987). Defendants do not dispute that the district court had subject matter jurisdiction over Plaintiffs' claims, *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993) (collecting cases) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); rather, Defendants argue that principles of international comity required the district court to abstain from exercising that jurisdiction here, *see O.N.E. Shipping Ltd.*, 830 F.2d at [illegible] ("Congress left it to the courts to decide when to employ notions of abstention from exercising jurisdiction in extraterritorial antitrust cases."); *see also* H.R. Rep. No. 97-686, at 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the Foreign Trade Antitrust Improvements Act[7] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction.").

To determine whether to abstain from asserting jurisdiction on comity grounds we apply the multi-factor

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7. "Under § 402 of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless 'such conduct has a direct, substantial, and reasonably foreseeable effect' on domestic or import commerce." *Hartford Fire*, 509 U.S. at 796 (quoting 15 U.S.C. § 6a(1)(A)) (internal citations omitted).

balancing test set out in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). *See O.N.E. Shipping Ltd.*, 830 F.2d at 451-52 (noting that "[t]he comity balancing test has been explicitly used in this Court"). Both *Timberlane Lumber* and *Mannington Mills* addressed the unique international concerns that are implicated by exercising jurisdiction over antitrust violations that occur abroad and that involve the laws and regulations of a foreign nation. *See Timberlane Lumber Co.*, 549 F.2d at 613 ("[T]here is the additional question which is unique to the international setting of whether the interests of, and links to, the United States including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority."); *Mannington Mills, Inc.*, 595 F.2d at 1296 ("When foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction."). Combined and summarized here, the enumerated factors from *Timberlane Lumber* and *Mannington Mills* (collectively the "comity balancing test") guiding our analysis of whether to dismiss on international comity grounds include: (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad

and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue. *Mannington Mills, Inc.*, 595 F.2d at 1297-98; *Timberlane Lumber Co.*, 549 F.2d at 614.

Since our adoption of the comity balancing test, the Supreme Court, in determining whether international comity cautioned against exercising jurisdiction over antitrust claims premised entirely on foreign conduct, relied solely upon the first factor—the degree of conflict between U.S. and foreign law—to decide that abstention was inappropriate. *Hartford Fire*, 509 U.S. at 798 ("The only substantial question in this litigation is whether there is in fact a true conflict between domestic and foreign law." (internal quotation omitted)). The Court explained that just because "conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws." *Id.* Thus, in that case, the degree of conflict between the laws of the two states had to rise to the level of a true conflict, i.e. "compliance with the laws of both countries [must have been] impossible," to justify the Court's abstention on comity grounds. *Id.* at 799.

In other words, "[n]o conflict exists . . . 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* (quoting Restatement (Third) of Foreign Relations Law § 403, cmt. e). After determining that there was not a true conflict, the Court reflected that there was "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the ground of international comity." *Id.*

We read *Hartford Fire* narrowly and interpret the modifying phrase "in this litigation" in reference to the "other considerations that might inform a decision" as suggesting that the remaining factors in the comity balancing test are still relevant to an abstention analysis. *Id.*; *see Mujica v. AirScan Inc.*, 771 F.3d 580, 600 (9th Cir. 2014) ("Since the majority did not address the 'other considerations' bearing on comity, the Court's *Hartford Fire* analysis 'left unclear whether it was saying that the only relevant comity factor *in that case* was conflict with foreign law . . . or whether the Court was more broadly rejecting balancing of comity interests in *any* case where there is no true conflict.'" (quoting Harold Hongju Koh, *Transnational Litigation in United States Courts* 80 (2008)). That a true conflict was lacking in *Hartford Fire* does not, in the inverse, lead us to conclude that the presence of such a conflict alone is sufficient to require dismissal and thereby vitiate the need to consider the remaining factors.

Some courts, after *Hartford Fire*, have gone further and do not require a true conflict between laws before applying the remaining factors in the comity balancing

test. *See, e.g., Mujica*, 771 F.3d at 600 ("We think that *Hartford Fire* does *not* require proof of a 'true conflict' as a prerequisite for invoking the doctrine of comity, at least in a case involving adjudicatory comity."); *Freund v. Rep. of Fr.*, 592 F. Supp. 2d 540, 574 (S.D.N.Y. 2008) ("In post-*Hartford Fire* cases, conflict analysis has not been rigidly invoked to preclude consideration of the full range of principles relating to international comity." (citation omitted)). Similarly, we have not required a true conflict where a party does not invoke a prescriptive comity defense, "that is, where a party [does not] claim[] that it is subject to conflicting regulatory schemes," as Defendants do here. *Mujica*, 771 F.3d at 600; *see Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) ("[T]he only issue of international comity properly raised here is whether adjudication of this case by a United States court would offend 'amicable working relationships' with Egypt." (citation omitted)). We need not, however, determine whether absent a true conflict, the district court could have abstained from asserting jurisdiction on comity grounds because, in our view and as explained below, there is a true conflict between U.S. law and Chinese law in this case.

C. True Conflict Analysis

To determine whether Defendants could have sold and distributed vitamin C while in compliance with both Chinese and U.S. law, and thus whether a "true conflict" exists, we must determine conclusively what the law of each country requires.

Appendix A

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. While this language has been interpreted to outlaw only unreasonable restraints in trade, *see, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997), certain types of anticompetitive conduct are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality," *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). "Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006). Thus, if Chinese law required Defendants to enter into horizontal price-fixing agreements, "compliance with the laws of both countries is [] impossible," *Hartford Fire*, 509 U.S. at 799, and there is a true conflict.

The Ministry, as *amicus*, has proclaimed on behalf of the Chinese Government that Chinese law, specifically the PVC regime during the relevant period, required Defendants, as manufacturers of vitamin C, to fix the price and quantity of vitamin C sold abroad. The Ministry mainly relies on the reference to "industry-wide negotiated prices" contained in the 2002 Notice to support its position. Plaintiffs, however, argue that the Ministry's statements are not conclusive and that because the 2002 Notice does not explicitly mandate price fixing, adherence to both Chinese law and U.S. antitrust law is possible. Our

interpretation of the record as to Chinese law thus hinges on the amount of deference that we extend to the Chinese Government's explanation of its own laws.

1. Standard of Deference

There is competing authority on the level of deference owed by U.S. courts to a foreign government's official statement regarding its own laws and regulations. In the seminal case *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942), the Supreme Court considered, *inter alia*, the extraterritorial reach of a 1918 decree nationalizing Russia's insurance business. The record before the *Pink* Court included expert testimony and "voluminous" other evidence bearing on the proper interpretation of the 1918 decree and its extraterritorial effect. *Id.* at 218. This evidence included an official declaration of the Russian Government explaining the intended extraterritorial effect of the decree. *See id.* at 219-20. The Court "d[id] not stop to review" the whole body of evidence, however, *id.* at 218, because it determined that the official declaration was "conclusive" as to the extraterritorial effect of the decree, *id.* at 220.

Since 1942, several courts have cited *Pink* for the proposition that an official statement or declaration from a foreign government clarifying its laws must be accepted as "conclusive." *See, e.g., D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280, 1284 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977) ("The principle of *Pink* requires this Court to accept the opinion of the attorney general of Mexico as an official declaration by that government that the effect

of the expropriation decree was to extinguish Papantla's royalty and participating rights in the expropriated oil."); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1363 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000) (accepting as conclusive an opinion issued by the Department of Justice of the Republic of the Philippines and presented to the court articulating the scope and effect of a law of the Philippines); *but see Access Telecom, Inc. v. MCI Telecomms. Corp*, 197 F.3d 694, 714 (5th Cir. 1999), *cert. denied*, 531 U.S. 917, 121 S. Ct. 275, 148 L. Ed. 2d 200 (2000) (holding, without citation to *Pink*, that "[t]he fact that U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S. law and U.S. courts may give deference to foreign governments before the court does not entail that U.S. courts must give deference to all agency determinations made by all foreign agencies not before the court.").

Other courts, however, have intimated that while the official statements of a foreign government interpreting its laws are entitled to deference, U.S. courts need not accept such statements as conclusive. For example, in *Amoco Cadiz*, presented with conflicting interpretations of a French law, the Seventh Circuit held that "[a] court of the United States owes substantial deference to the construction France places upon its domestic law. . . . Giving the conclusions of a sovereign nation less respect than those of [a United States] administrative agency is unacceptable." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (internal citations omitted).

Appendix A

The district court below, at the motion to dismiss stage, relied on three authorities—Rule 44.1, *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142 (2d Cir. 2008), and *Karaha Bodas Co.*, 313 F.3d 70—for the proposition that the Second Circuit, in particular, has "adopted a softer view toward the submissions of foreign governments." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 557. We disagree with this conclusion.

Contrary to the district court's reasoning, we find no support for the argument that Rule 44.1, adopted in 1966 long after *Pink* was decided, modified the level of deference that a U.S. court must extend to a foreign government's interpretation of its own laws. Rule 44.1 provides that, when determining foreign law, a court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. According to the advisory committee notes, the rule has two purposes: (1) to make a court's determination of foreign law a matter of law rather than fact, and (2) to relax the evidentiary standard and to create a uniform procedure for interpreting foreign law. Fed. R. Civ. P. 44.1 advisory committee's notes to 1966 adoption. The advisory committee notes suggest that Rule 44.1 was meant to address some of the challenges facing litigants whose claims and defenses depended upon foreign law and to provide courts with a greater array of tools for understanding and interpreting those laws. *Id.* Rule 44.1 explicitly focuses on *what* a court may consider when determining foreign law, but it is silent as to *how* a court should analyze the relevant material or sources. Thus,

courts must still evaluate the relevant source material within the context of each case. *See, e.g., Curley v. AMR Corp.*, 153 F.3d 5, 14-15 (2d Cir. 1998) (explaining that because "Mexican law is much different" than New York state law and "its sources do not lie in precedent cases" the court must "consider the text of the constitution, civil code and statutory provisions . . . and give them preponderant consideration" when analyzing Mexican law). Finding no authority to the contrary, we conclude that Rule 44.1 does not alter the legal standards by which courts analyze foreign law, and thus, the rule does not abrogate or "soften" the level of deference owed by U.S. courts to statements of foreign governments appearing in U.S. courts.

The district court looked to our decision in *Villegas Duran* to bolster its conclusion that this court has adopted a softer view toward submissions of foreign governments. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 557. In *Villegas Duran* we declined to credit an affidavit from the Chilean Government that clarified the appellant's child custody rights under Chilean law. 534 F.3d at 148 ("Reasons existed for the district court to refrain from giving the affidavit absolute deference."). We consider *Villegas Duran* inapplicable to the present case for two reasons. First, because the Chilean Government did not appear before the court in that case, either as a party or as an *amicus*, the level of deference the court afforded the Chilean affidavit does not guide our application here. Second, *Villegas Duran* was overturned by the Supreme Court, *Duran v. Beaumont*, 560 U.S. 921, 130 S. Ct. 3318, 176 L. Ed. 2d 1216 (2010), in light of *Abbott v. Abbott*, 560

U.S. 1, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010). In *Abbott*, the Court analyzed the same Chilean custody law at issue in *Villegas Duran* but found the very same affidavit from the Chilean Government that was submitted in *Villegas Duran* "notable" in its analysis of Chilean law and adopted Chile's interpretation of that law. *Abbott*, 560 U.S. at 10-11 ("[I]t is notable that a Chilean agency has explained that [the Chilean law] is a 'right to authorize the minors' exit' from Chile and that this provision means that neither parent can 'unilaterally' 'establish the [child's] place of residence.'"(internal citation omitted)). To the extent that the majority's analysis in *Villegas Duran* suggests that a foreign sovereign's interpretation of its own laws warrants a lesser degree of deference, the Supreme Court's approach in interpreting Chilean law—relying, in part, on the Chilean Government's affidavit—requires us to question, if not reject, *Villegas Duran* as precedent bearing on that issue.

Finally, the district court also relied on our decision in *Karaha Bodas*, 313 F.3d 70, to support its conclusion. In that case, a judgment creditor of an oil and gas company owned and controlled by the Republic of Indonesia sought to execute upon funds held in New York trust accounts. *Id.* at 71. The Republic of Indonesia joined the appeal as a party with an affected interest, and in so doing, sought to clarify the applicable Indonesian law as well as the Indonesian Government's relationship with the gas company. *Id.* Citing to our sister circuits in *Amoco Cadiz* and *Access Telecom*, we credited the Republic of Indonesia's interpretation and explained that "a foreign sovereign's views regarding its own laws merit—although

they do not command—some degree of deference." *Id.* at 92. We clarified that, "where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." *Id.*

It is noteworthy that, while we suggested in *Karaha Bodas* that deference to a foreign sovereign's interpretation need not be "conclusive" in every case, we ultimately adopted the Republic of Indonesia's interpretation of its own regulation.[8] Indeed, we have yet to identify a case where a foreign sovereign appeared before a U.S. tribunal and the U.S. tribunal adopted a reading of that sovereign's laws contrary to that sovereign's interpretation of them.

Consistent with our holding in *Karaha Bodas* and the Supreme Court's pronouncements in *Pink*, we reaffirm the principle that when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements. If deference by any measure is to mean

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8. Although we adopted the Republic of Indonesia's "reading of the relevant Indonesian law," we declined to accept fully Indonesia's argument on appeal because it had "not identified any Indonesian statute or regulation" in support of its position. *Karaha Bodas*, 313 F.3d at 92. To the extent there is no documentary evidence or reference of law proffered to support a foreign sovereign's interpretation of its own laws, deference may be inappropriate.

anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system. *Cf. Abbott*, 560 U.S. at 20 ("Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration . . . ."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) (recognizing, among other things, that the "basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system" creates "disagreements as to [the] relevant international legal standards" such that inquiring into the validity of a foreign sovereign's actions is barred by the state action doctrine). Not extending deference in these circumstances disregards and unravels the tradition of according respect to a foreign government's explication of its own laws, the same respect and treatment that we would expect our government to receive in comparable matters before a foreign court. *Cf. Hilton v. Guyot*, 159 U.S. 113, 191, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (explaining that the rule of reciprocity should "work itself firmly into the structure of our international jurisprudence"); *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 743 (2d Cir. 2016) ("The declaration of a United States court that the executive branch of the Russian government violated its own law . . . would be

an affront to the government of a foreign sovereign."); *Villegas Duran*, 534 F.3d at 153 (Wesley, *J.*, dissenting) (explaining that "this Court's practice of giving some deference to a foreign sovereign's view of its own law" and "careful attention" to the interpretation of foreign law is exactly what "we would expect . . . of a [foreign] court" in a reciprocal situation).

2. Applying Deference to the Ministry's Brief

The official statements of the Ministry should be credited and accorded deference. On that basis, we conclude, as Defendants and the Ministry proffer, that Chinese law required Defendants to engage in activities in China that constituted antitrust violations here in the United States.

The 2002 Notice, *inter alia*, demonstrates that from 2002 to 2005, the relevant time period alleged in the complaint, Chinese law required Defendants to participate in the PVC regime in order to export vitamin C. This regulatory regime allowed vitamin C manufacturers the export only of vitamin C subject to contracts that complied with the "industry-wide negotiated" price. Although the 2002 Notice does not specify how the "industry-wide negotiated" price was set, we defer to the Ministry's reasonable interpretation that the term means what it suggests—that members of the regulated industry were required to negotiate and agree upon a price. It would be nonsensical to incorporate into a government policy the concept of an "industry-wide negotiated" price and require vitamin C manufacturers to comply with that

minimum price point if there were no directive to agree upon such a price. Moreover, while on their face the terms "industry self-discipline," "coordination," and "voluntary restraint" may suggest that the Defendants were not required to agree to "industry-wide negotiated" prices, we defer to the Ministry's reasonable explanation that these are terms of art within Chinese law connoting the government's expectation that private actors actively self-regulate to achieve the government's policy goals in order to minimize the need for the government to resort to stronger enforcement methods.[9] In this context, we find it reasonable to view the entire PVC regime as a decentralized means by which the Ministry, through the Chamber, regulated the export of vitamin C by deferring to the manufacturers and adopting their agreed upon price as the minimum export price. In short, by directing vitamin C manufacturers to coordinate export prices and quantities and adopting those standards into the regulatory regime, the Chinese Government required Defendants to violate the Sherman Act. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) ("[I]t is [] well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring.").

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9. Similarly, while the documentary evidence shows that when China transitioned from the export quota regime to the PVC regime the role of the Subcommittee within China's regulatory framework changed from a governmental group whose membership was mandatory to a non-governmental trade organization whose membership was voluntary, we again defer to the Ministry's reasonable interpretation that the PVC regime required industry-wide coordination of prices regardless of whether membership in the Subcommittee was required.

We reiterate that deference in this case is particularly important because of the unique and complex nature of the Chinese legal- and economic-regulatory system and the stark differences between the Chinese system and ours. As the district court recognized, "Chinese law is not as transparent as that of the United States or other constitutional or parliamentary governments." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559. China's legal system is distinct from ours in that "[r]ather than codifying its statutes, the Chinese government [] frequently governs by regulations promulgated by various ministries . . . . [and] private citizens or companies may be authorized under Chinese regulations to act in certain circumstances as government agents." *Id.* Moreover, the danger that "an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law" is all the more plausible where the documents the district court relied upon are translations and use terms of art which are unique to the Chinese system. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 542. Deferring to the Ministry's explanation of what is legally required under its system is all the more important where, as here, the record evidence shows a clear disparity between China's economic regulatory regime and our own.

Instead of viewing the ambiguity surrounding China's laws as a reason to defer to the Ministry's reasonable interpretation, the district court, recognizing generally the unique features of China's system, attempted to parse out Defendants' precise legal role within China's complex

vitamin C market regulatory framework.[10] Noting the discrepancies between China's interpretations of its laws and Plaintiffs' contrary reading of the underlying regulations, the district court determined that, because "[i]t is not clear from the record at this stage of the case whether defendants were performing [a] government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens[,]" further inquiry into the voluntariness of Defendants' actions was warranted. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559. Specifically, the district court found problematic the possibility that the "defendants [made] their own choices and then ask[ed] for the government's imprimatur." *Id.*

The problems with the district court's approach were threefold. First, it determined that whether Chinese law compelled Defendants' anticompetitive conduct depended in part on whether Defendants petitioned the Chinese Government to approve and sanction such conduct. Second, it relied on evidence that China's price-fixing laws were not enforced to conclude that China's price fixing laws did not exist. And third, it determined that if Chinese law did not compel the exact anticompetitive conduct alleged in the complaint, then there was no true conflict.

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10. We note that if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate.

Whether Defendants had a hand in the Chinese government's decision to mandate some level of price-fixing is irrelevant to whether Chinese law actually required Defendants to act in a way that violated U.S. antitrust laws.[11] Moreover, inquiring into the motives behind the Chinese Government's decision to regulate the vitamin C market in the way it did is barred by the act of state doctrine. "In essence, the act of state doctrine is a principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government." *O.N.E. Shipping Ltd.*, 830 F.2d at 452. The act of state doctrine precludes us from discrediting the Subcommittee or the PVC process as ad hoc protectionist regimes that were intended to provide governmental sanction to an otherwise privately formed cartel. By focusing on the Defendants' role in the regulatory regime, as opposed to the regime itself, the district court erroneously required Defendants to show that the government essentially forced Defendants to price-fix against their will in order to show that there was a true conflict between U.S. antitrust law and Chinese law. This demands too much. It is enough that Chinese law actually mandated such action, regardless of whether Defendants benefited from, complied with, or orchestrated the mandate. Thus, we decline to analyze why China regulated vitamin C in the manner it did and instead focus on what Chinese law required. *See id.* at 453.

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11. To use a domestic example, it would be equally inappropriate for a U.S. court, when analyzing U.S. insurance law, to inquire into the lobbying efforts of U.S. insurance companies for the purposes of determining whether U.S. insurance law applied to those companies.

Similarly, inquiring into whether the Chinese Government actually enforced the PVC regime as applied to vitamin C exports confuses the question of what Chinese law required with whether the vitamin C regulations were enforced.[12] Plaintiffs argue that because there was extensive evidence that Defendants exported vitamin C without first obtaining the required chop and that Defendants sold vitamin C below the government floor price of $3.35/kg, the Chinese Government did not actually require compliance with the PVC regime. We are disinclined to view this factual evidence of China's unwillingness or inability to enforce the PVC regime as relevant to the PVC regime's legal mandate.

Finally, the district court made a conceptual error about the potential difference between foreign compulsion and a true conflict. The district court credited Plaintiffs' argument that because there was evidence that Defendants routinely agreed to export vitamin C at a price well above the agreed upon price of $3.35/kg, the Defendants alleged anticompetitive conduct was not compelled. But this conclusion misses the mark. Even if Defendants' specific conduct was not compelled by the 2002 Notice, that type of compulsion is not required for us to find a true conflict between the laws of the two sovereigns. It is sufficient "if compliance with the laws of both countries is impossible." *Hartford Fire*, 509 U.S.

12. To use another domestic example, it would be inappropriate for a U.S. court, when analyzing whether U.S. labor laws required factory workers to wear safety masks, to examine evidence of how often factory owners were punished for such violations or how many factory owners actually complied with the safety mask regulations.

at 799. Whether Defendants, in fact, charged prices in excess of those mandated by the 2002 Notice does not weigh heavily into our consideration of whether the PVC regime, on its face, required Defendants to violate U.S. antitrust laws in the first instance.

Because we hold that Defendants could not comply with both U.S. antitrust laws and Chinese law regulating the foreign export of vitamin C, a true conflict exists between the applicable laws of China and those of the United States.

D. Applying the Remaining Comity Factors

Having determined that Chinese law required Defendants to violate U.S. antitrust law, we now consider whether the remaining factors weigh in favor of dismissal based on principles of international comity. The district court, both at the motion to dismiss and the summary judgment stages, did not apply the remaining factors because it determined that Chinese law did not require price fixing. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559; *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 525-26. We need not remand the case to the district court for consideration of these factors in the first instance because the factors clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction. *See, e.g., Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 132 (2d Cir. 2013) (while "[i]t is ordinarily appropriate for us to vacate the judgment of a district court and remand the" case, "where a record is fully developed and it discloses that, in our judgment, only one possible resolution" of the

remaining issue would be permissible "there is no reason to remand").

The remaining factors in the comity balancing test are: (1) nationality of the parties, locations or principal places of business of corporations; (2) relative importance of the alleged violation of conduct here compared to that abroad; (3) the extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (4) existence of intent to harm or affect American commerce and its foreseeability; (5) possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (6) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (7) whether the court can make its order effective; (8) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (9) whether a treaty with the affected nations has addressed the issue. *Mannington Mills, Inc.*, 595 F.2d at 1297-98; *Timberlane Lumber Co.*, 549 F.2d at 614. Applying the test here, we hold that these remaining factors decidedly weigh in favor of dismissal and counsel against exercising jurisdiction in this case.

All Defendants are Chinese vitamin C manufacturers with their principle places of business in China, and all the relevant conduct at issue took place entirely in China. Although Plaintiffs may be unable to obtain a remedy for Sherman Act violations in another forum, complaints as to China's export policies can adequately be addressed

through diplomatic channels and the World Trade Organization's processes. Both the U.S. and China are members of the World Trade Organization and are subject to the same rules on export restrictions. Moreover, there is no evidence that Defendants acted with the express purpose or intent to affect U.S. commerce or harm U.S. businesses in particular. Rather, according to the Ministry, the regulations at issue governing Defendants' conduct were intended to assist China in its transition from a state-run command economy to a market-driven economy, and the resulting price-fixing was intended to ensure China remained a competitive participant in the global vitamin C market and to prevent harm to China's trade relations. While it was reasonably foreseeable that China's vitamin C policies would generally have a negative effect on Plaintiffs as participants in the international market for vitamin C, as noted above, there is no evidence that Defendants' antitrust activities were specifically directed at Plaintiffs or other U.S. companies.

Furthermore, according to the Ministry, the exercise of jurisdiction by the district court has already negatively affected U.S.-China relations. *See* Joint App'x at 1666, U.S. Vitamin Fine "unfair and inappropriate" Says Mofcom, Global Competition Review, Katy Oglethorpe, March 21, 2013 (quoting the Chinese government as stating that the district court's judgment "will cause problems for the international community and international enterprises, and will eventually harm the interests of the United States due to the increase in international disputes"). The Chinese Government has repeatedly made known to the federal courts, as well as to the United States Department

of State in an official diplomatic communication relating to this case, that it considers the lack of deference it received in our courts, and the exercise of jurisdiction over this suit, to be disrespectful and that it "has attached great importance to this case."[13] Doc. No. 111, Diplomatic Correspondence between Embassy for the People's Republic of China and the United States Department of State, April 9, 2014; *cf. Société Nationale Industrielle Aérospatiale*, 482 U.S. at 546 ("[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a *coordinate interest* in the litigation." (emphasis added)).

Currently, the district court's judgment orders Defendants to comply with conflicting legal requirements. This is an untenable outcome. It is unlikely, moreover, that the injunctive relief the Plaintiffs obtained would be enforceable in China. If a similar injunction were issued in China against a U.S. company, prohibiting that company from abiding by U.S. economic regulations, we would undoubtedly decline to enforce that order. *See Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 2016 U.S. App. LEXIS 13991, 2016 WL 4087215 (2d Cir. 2016) ("[A] final judgment obtained through sound procedures in a foreign country is generally conclusive . . .

13. We take judicial notice of the diplomatic communication from the Embassy of the People's Republic of China to the United States State Department dated April 9, 2014. *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe*, 566 F.2d 861, 862 (2d Cir. 1977). The Ministry's motion as to the diplomatic communication is denied as moot.

unless . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought." (internal quotation omitted)).

Simply put, the factors weigh in favor of abstention. Recognizing China's strong interest in its protectionist economic policies and given the direct conflict between Chinese policy and our antitrust laws, we conclude that China's "interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law." *O.N.E. Shipping Ltd.*, 830 F.2d at 450. Accordingly, we hold that the district court abused its discretion by failing to abstain on international comity grounds from asserting jurisdiction, and we reverse the district court's order denying Defendants' motion to dismiss.[14]

We further note that while we abstain from adjudicating Plaintiffs' claims with respect to the Defendants' conduct, the Plaintiffs are not without recourse to the executive branch, which is best suited to deal with foreign policy, sanctions, treaties, and bi-lateral negotiations. Because we reverse and remand for dismissal on the basis of international comity, we do not address the act of state,

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14. We note that it may not be reasonable in all cases to abstain on comity grounds from asserting jurisdiction at the motion to dismiss stage and that a trial court may need the opportunity to consider the countervailing interests and policies on the record that follows discovery. In this case, however, dismissal is appropriate because, after limited discovery, the record before the court at the motion to dismiss stage was sufficient to determine what Chinese law required and whether abstention was appropriate.

foreign sovereign compulsion, or political question defenses.

CONCLUSION

According appropriate deference to the Ministry's official statements to the district court and to this Court on appeal, we hold that Defendants were required by Chinese law to set prices and reduce quantities of vitamin C sold abroad and doing so posed a true conflict between China's regulatory scheme and U.S. antitrust laws such that this conflict in Defendants' legal obligations, balanced with other factors, mandates dismissal of Plaintiffs' suit on international comity grounds. Accordingly, we **VACATE** the district court's judgment entered November 27, 2013, **REVERSE** the order of November 11, 2008, denying Defendants' motion to dismiss, and **REMAND** with instructions to dismiss Plaintiffs' complaint with prejudice.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED NOVEMBER 26, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-1738 (BMC) (JO); 05-CV-0453

IN RE VITAMIN C ANTITRUST LITIGATION.

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Plaintiffs,

v.

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Defendants.

November 25, 2013, Decided
November 26, 2013, Filed

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

On March 14, 2013, a jury reached found defendants Hebei Welcome Pharmaceutical Co., Ltd. ("Hebei") and North China Pharmaceutical Group Corp. ("NCPGC")[1]

1. All other defendants in this action settled either prior to or during trial. The jury's verdict only addressed the liability of Hebei and NCPGC.

liable to plaintiffs[2] for violating the Sherman Act. Currently before the Court are two post-trial motions. First, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, defendants have renewed their motion for judgment as a matter of law on three grounds. Second, the Injunction Class has moved for an order permanently enjoining defendants from entering into any agreements to fix the price or limit the supply of vitamin C. Familiarity with the facts and procedural history of this action is presumed. For the reasons set forth below, defendants' motion is denied and the Injunction Class's motion is granted.

I. Defendants' Renewed Motion for Judgment as a Matter of Law

In order to succeed on their renewed motion for judgment as a matter of law, defendants must bear "a heavy burden." *Cash v. Cnty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011). A movant can be "awarded judgment as a matter of law only when 'a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *Id.* (quoting Fed. R. Civ. P. 50(a)(1)). "[T]he district court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Zellner v. Summerlin*, 494 F.3d 344, 370 (2d Cir. 2007) (internal quotations and alterations omitted).

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2. The Court certified two plaintiff classes in this action, the Director Purchaser Damages Class and the Injunction Class.

Therefore, where, as here, a "jury has deliberated in the case and actually returned its verdict," the "court may set aside the verdict only if there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded persons could not arrive at a verdict against it." *Cash*, 654 F.3d at 333 (internal quotation marks omitted). Here, defendants have sought judgment as a matter of law on three grounds. I will address each ground in turn.

A. Act of State, Foreign Sovereign Compulsion, and International Comity

First, defendants argue that the jury's verdict against them is barred as a matter of law by the doctrines of act of state, foreign sovereign compulsion, and international comity.[3] In essence, defendants contend that the Court's prior rulings that Chinese law did not compel defendants' actions were erroneous and that plaintiffs' claims never should have been brought before a jury. Alternatively, defendants argue that even if it was proper to submit this matter to a jury, the trial was "fatally flawed" by my decision to exclude from the jury copies of Chinese laws and regulations and witness testimony about the meaning and content of those laws. The Court stands by and reaffirms its prior rulings that Chinese law did not

3. Defendants previously raised these arguments in a motion to dismiss, which was denied by the late Judge Trager, and in a motion for summary judgment, or, alternatively, a motion for a determination of foreign law under Fed. R. Civ. P. 44.1, which I denied.

compel defendants to engage in antitrust violations, that the doctrines of act of state and international comity do not bar plaintiffs' suit, and that it was inappropriate to present evidence about the meaning of Chinese laws to the jury. Nothing has changed from these pretrial rulings and defendants have stated no additional grounds to revisit them.

Moreover, defendants ignore that one purpose of the trial in this matter was to determine whether, regardless of what Chinese law authorized, defendants' conduct was actually compelled by the Chinese government as a matter of a fact.[4] Therefore, the Court instructed the jury that it was required to return a defense verdict if defendants proved, by a preponderance of the evidence, that the Chinese government actually compelled them to fix the price or limit the supply of vitamin C and defendants have not challenged this instruction.

There was ample evidence presented at trial from which the jury could have found that the Chinese government did not actually compel defendants' decisions to fix the price and limit the supply of vitamin C — including evidence suggesting that the "verification and chop" mechanism did not actually compel defendants to enter into anticompetitive agreements and that the Vitamin C Subcommittee of the Chamber of Commerce of

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4. The need for a jury to determine whether factual compulsion became even clearer during the trial when several witnesses testified that contemporaneous documents offered as evidence on the compulsion issue — including memoranda addressed to China's Ministry of Commerce — were inaccurate.

Medicines and Health Products Importers and Exporters (the "Chamber") was a voluntary trade association. Moreover, in rejecting the compulsion defense, the jury necessarily assessed the credibility of witnesses' testimony and, on a Rule 50(b) motion, the Court may not second-guess those determinations. *See Zellner*, 494 F.3d at 370. Chinese laws themselves were not placed on trial. Rather, the jury was only required to determine whether the Chinese government acted, not the propriety of its actions.

Nor, despite defendants' suggestion, was it error for the Court to exclude from the jury copies of Chinese laws and regulations and witness testimony about the meaning and content of those laws.[5] Pursuant to Fed. R. Civ. P. 44.1, the determination of foreign law is a question of law. It is for the Court, not for the jury, to decide questions of law and the Court did so when it ruled that, as a matter of law, Chinese law did not compel defendants' conduct. Accordingly, defendants' renewed motion for judgment as a matter of law based on the act of state, foreign sovereign compulsion, and international comity doctrines is denied.

B. NCPGC's Liability

Second, NCPGC seeks judgment as a matter of law dismissing plaintiffs' claims and vacating the jury's verdict against it on the ground that there was insufficient evidence for the jury to find that NCPGC

5. Defendants have not sought a new trial because of the Court's exclusion of this supposed evidence.

was a member of the anticompetitive conspiracy at issue. NCPGC contends that the overwhelming weight of the evidence demonstrates that it was Hebei, its indirect subsidiary, which participated in the Chamber's vitamin C subcommittee meetings and entered into the relevant agreements, not NCPGC. It points to numerous memoranda summarizing meetings of the Vitamin C Subcommittee which provide no evidence that any NCPGC agents entered into anticompetitive agreements on behalf of NCPGC and it characterizes the evidence on which plaintiffs rely as "limited" and "marginal."

I previously expressed my doubts concerning the sufficiency of plaintiffs' proof of NCPGC's participation in the conspiracy in the context of defendants' Rule 50(a) motion, but nonetheless denied the motion. Although the evidence adduced by plaintiffs on this issue is hardly overpowering, I cannot conclude that there was a "complete absence of evidence" suggesting NCPGC's participation such that "the jury's findings could only have been the result of sheer surmise and conjecture." *Cash*, 654 F.3d at 333.

NCPGC attacks several categories of evidence relied on by plaintiffs but, in order to deny NCPGC's motion, I need look no further than the evidence relating to Huang Pinqi. The record shows that Mr. Huang served as Hebei's general manager and later board chairman. In 2003, while Mr. Huang was still serving as Hebei's general manager, he also became the deputy general manager at NCPGC and remained in that position through the relevant time period. It is undisputed that Mr. Huang participated in

the meetings of the Vitamin C Subcommittee at which defendants entered into anticompetitive agreements. But, according to defendants, the evidence shows that Mr. Huang participated in those meetings as a representative of Hebei, not NCPGC. Indeed, Qaio Haili, a former Chamber official, testified that Mr. Huang always attended Subcommittee meetings as a Hebei representative and numerous documents regarding Subcommittee meetings describe Mr. Huang as a Hebei representative.

To demonstrate that Mr. Huang also participated in these meetings on behalf of NCPGC, plaintiffs rely on PX 124 — a November 2004 Chamber website announcement of Mr. Huang's election as the chair of the Vitamin C Subcommittee. PX 124 refers to Mr. Huang by his NCPGC title. Both Mr. Huang and Qaio Haili, a former Chamber official, testified that this reference was merely an honorific that does not suggest that Mr. Huang participated in the Chamber on behalf of NCPGC. The persuasiveness of this explanation obviously depends on the credibility of Mr. Huang and Mr. Qaio and, given the fact that these witnesses repeatedly questioned the accuracy of certain contemporaneously created documents, there were ample grounds for the jury to question their credibility.[6] The jury had every right to credit the documentary evidence over the conflicting testimony from defense witnesses and, in

6. For similar reasons, the jury properly could have discounted Mr. Qiao's testimony that NCPGC was not a member of the Vitamin C Subcommittee and was not eligible to be a member, especially in light of evidence showing that NCPGC participated in an agreement to fix penicillin prices despite being neither a member of the Penicillin Subcommittee nor a penicillin manufacturer.

the context of a motion for judgment as a matter of law, it is not appropriate for the Court to second-guess this determination.

Additionally, Mr. Huang never denied attending Subcommittee meetings on behalf of NCPGC and never testified that he only attended these meetings on behalf of Hebei. Although NCPGC was, of course, not required to disprove its participation, such testimony might have suggested that PX 124 could not support an inference that NCPGC participated in the conspiracy. Further, Mr. Huang testified that, prior to this election as chair of the Subcommittee, he moved his office from Hebei to NCPGC and, from that point forward, was "seldom" present at Hebei. The jury reasonably could have inferred that NCPGC participated in Subcommittee meetings at which anticompetitive agreements were entered since, when he participated in those meetings, Mr. Huang was working primarily from NCPGC. Lastly, plaintiffs produced other evidence, including NCPGC's descriptions of its activities on its website, Hebei reports concerning vitamin C manufacturing sent to NCPGC during the relevant period, and memoranda from a co-conspirator describing NCPGC's support for coordinated termination of vitamin C production. Although NCPGC criticizes each of these pieces of evidence individually, they were all put before the jury and their cumulative effect cannot be discounted. In light of PX 124, possible questions about defense witness credibility, and this other supporting evidence, I hold that there was a sufficient evidentiary basis for the jury to conclude that NCPGC participated in the conspiracy and therefore deny NCPGC's motion.

C. Reduction of Damages

Third, defendants seek a reduction of the damages award due to the Direct Purchaser Damages Class by $7.5 million ($22.5 million after trebling). According to defendants, this amount corresponds to purchases from two non-defendants alleged to be co-conspirators, Shandong Zibo Hualong Co., Ltd ("Hualong") and Anhui Tiger Biotech Co. ("Tiger"). Defendants contend that plaintiffs failed to prove that the contracts with Hualong and Tiger lacked arbitration clauses, and that if those contracts did have arbitration clauses, then plaintiffs would be relegated to arbitration, and cannot recover damages in this action.[7] Defendants argue that, because of this lack of evidence, the Direct Purchaser Damages Class did not carry its burden of proving this portion of its damages, that the Court improperly shifted the burden of proof on to defendants, and that the jury's award is speculative.

As I said when I denied defendants' Rule 50(a) motion, I think they have this precisely backwards. One can theorize all kinds of contractual provisions that might limit or eliminate the Hualong and Tiger contracts from the calculation of damages — *e.g.*, foreign selection clauses, liability caps, or shortened statutes of limitations. Defendants have seized on the possibility of an arbitration clause in these contracts, but whatever the basis for excluding them from the calculation of damages, it was

7. Pursuant the definition of the certified Direct Purchaser Damages Class, only purchasers who bought vitamin C under contracts without arbitration clauses could recover damages.

defendants' burden, not plaintiffs', to show the jury what that basis was. Any provision in those contracts that might have reduced plaintiffs' damage claim was analogous to an affirmative response to plaintiffs' damage theory, and like an affirmative defense, defendants had to point to such provisions. They failed to do so.

The Direct Purchaser Damages Class presented expert testimony from Dr. Bernheim estimating the amount of vitamin C purchases falling within the class definition based on U.S. International Trade Commission data and documents produced by the conspirators — documents which demonstrated that Hualong and Tiger were members of the Vitamin C Subcommittee and that their representatives attended meetings with the other conspirators. This evidence satisfied the Class's *prima facie* burden. If defendants wanted to dispute the Class's damages estimate, it was incumbent upon them to present evidence that the Class's *prima facie* showing was inaccurate and that certain contracts should have been excluded from the damages award. Defendants attempted to do that through the testimony of their expert, Dr. Wu, who testified that Dr. Bernheim's analysis was flawed.[8] But the jury rejected Dr. Wu's testimony, as evidenced by the award of damages in its verdict, and defendants never offered evidence showing that any contracts with Hualong and Tiger actually contained arbitration clauses. Therefore, I am not convinced that the damages award is impermissibly speculative and I deny defendants' motion

8. Defendants, however, never cross-examined Dr. Bernheim concerning his decision to include Tiger and Hualong sales in his damages estimate.

to reduce the damages award (or alter or amend the judgment) by $7.5 million ($22.5 million after trebling).

II. The Motion for a Permanent Injunction

Finally, the Injunction Class seeks a permanent injunction, lasting ten years, against defendants under Section 16 of the Clayton Act, which authorizes the district courts to issue "injunctive relief . . . against threatened loss or damages by a violation of the antitrust laws." 15 U.S.C. § 26. The parties agree that the determination of whether to issue an injunction is governed by the four-part test set forth in *eBay Inc. v. MerchExchange, L.L.C.*, 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). Under that test, "a plaintiff seeking a permanent injunction must . . . . demonstrate (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 391, 126 S. Ct. at 1839. I address each requirement in turn.

First, with regard to irreparable injury, in order to obtain a Section 16 injunction, a plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969). Here, the Injunction Class has already proven injury,

as demonstrated by the jury verdict. Defendants argue that the jury verdict only applies to the class period — December 2001 through June 2006 — and that there is no evidence that the anticompetitive conspiracy is continuing. But that argument is unpersuasive. *See In re Data Gen. Corp. Antitrust Litig.*, MDL Dkt. No. 369, 1986 U.S. Dist. LEXIS 22076, 1986 WL 10899, at * (N.D. Cal. July 30, 1986) (imposing an injunction despite the observation that "a permanent injunction almost by definition must rest on outdated facts").

Moreover, there is evidence that anticompetitive conduct is likely to recur if not enjoined.Documentary evidence indicates that the conspirators discussed performing future actions "in a more hidden and smart way" and testimony established that, after this lawsuit was filed, conspirators stopped keeping notes of their meetings. Defendants have not renounced their conduct and they continue to contest their liability. *See Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1472 (M.D. Ala. 1993) (issuing a permanent injunction in an antitrust case where, among other things, defendants "failed to acknowledge their wrong-doing").

For the indirect purchasers, who comprise the vast majority of Injunction Class members, the injury they already suffered and any similar injury they are likely to suffer in the future is irreparable. Indirect purchasers of vitamin C cannot bring a federal claim for damages, *see generally Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), and many also lack a state law-based cause of action for damages. Further,

"[h]arm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to . . . measure, or that it is a loss that one should not be expected to suffer." *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010). It undoubtedly would be difficult to measure the injury that anticompetitive conduct would cause indirect vitamin C purchasers and no Injunction Class member should be expected to suffer injury as a result of illegal anticompetitive conduct. Accordingly, I conclude that the first *eBay* factor is satisfied.

For many of the same reasons, I conclude that the Injunction Class does not have an adequate remedy at law and the second *eBay* factor is satisfied. As noted, many indirect vitamin C purchasers cannot bring any claim for damages if defendants engage in further anticompetitive conduct. Further, even direct purchasers are only entitled to damages equal to the overcharge paid for vitamin C as a result of illegal conduct. As the eight-year (and still ongoing) history of this action attests, prosecuting international antitrust claims are difficult, costly, and time-consuming. Should defendants recommence their anticompetitive conduct, the Injunction Class will have to incur considerable expense in order to vindicate its rights.

With regard to the third *eBay* factor, the balance of hardships, contrary to defendants' contention, the injunction sought is neither "drastic" nor "extraordinary." It prohibits agreements "to fix the price or limit the supply of vitamin C sold in the United States in violation of Section 1 of the Sherman Act." In other words, all the injunction does is prohibit defendants from committing

what, independently, would constitute an illegal act. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S. Ct. 811, 841, 84 L. Ed. 1129 (1940) ("[T]his Court has consistently and without deviation adhered to the principle that price-fixing arrangements are unlawful per se under the Sherman Act."). Mandating compliance with the law can hardly be considered burdensome. And, as discussed, the Injunction Class would have to incur considerable expense if it had to vindicate its rights through another litigation. Thus, I conclude that the balance of hardships favors the injunction.

Finally, the fourth *eBay* factor concerns the public interest. Civil damages suits to enforce the antitrust laws are unquestionably in the public interest. *See Zenith*, 395 U.S. at 133, 89 S. Ct. at 1582 ("[T]reble-damage cases, which are brought for private ends, . . . also serve the public interest in that they effectively pry open to competition a market that has been closed by defendants' illegal restraints.") (internal quotation marks omitted). Defendants contend that a permanent injunction "would interfere with the Chinese government's sovereign authority and its ability to regulate its own domestic affairs." This argument ignores the fact that the jury found defendants liable based on voluntary, uncompelled conduct. If, in the future, the operation of the permanent injunction comes into conflict with China's sovereign regulatory authority, defendants, or any other enjoined party, may seek to have the injunction vacated or limited on that basis. However, the Court will not deny the Injunctive Class relief to which it is otherwise entitled on the basis of speculative and uncertain future interference

with the regulatory authority of another nation. Therefore, I conclude that a permanent injunction is in the public interest and that the Injunction Class is entitled to the permanent injunction it seeks.

CONCLUSION

Defendants' renewed motion for judgment as a matter of law [688] is denied and the Injunction Class's motion for a permanent injunction [693] is granted. An Amended Judgment and Decree will issue by separate order.

SO ORDERED.

Dated: Brooklyn, New York
November 25, 2013

APPENDIX C — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED SEPTEMBER 6, 2011

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 06-MD-1738 (BMC)(JO)

IN RE VITAMIN C ANTITRUST LITIGATION.
This document refers to: All Actions.

September 6, 2011

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

Plaintiffs have filed suit against Chinese vitamin C manufacturers, alleging that they engaged in an illegal cartel to fix prices and limit supply for exports, including those to the United States.[1] The four main defendants are Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome" or "Welcome"), Aland (Jiangsu) Nutraceutical Co., Ltd. ("Jiangsu Jiangshan" or "JJPC"), Northeast

1. Two similar price-fixing suits are currently pending against Chinese producers of magnesite and bauxite. *See Animal Science Prods., Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010), *vacated*, 654 F.3d 462, 2011 U.S. App. LEXIS 17046, 2011 WL 3606995 (3d Cir. Aug. 17, 2011); *Resco Prods., Inc. v. Bosai Minerals Group Co., Ltd.*, No. 06-235, 2010 U.S. Dist. LEXIS 54949, 2010 WL 2331069 (W.D. Pa. June 4, 2010).

Pharmaceutical Co. Ltd. ("NEPG" or "Northeast") and Weisheng Pharmaceutical Co. Ltd. ("Weisheng") (collectively "defendants").[2]

Plaintiffs bring this putative class action under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. Plaintiffs seek treble damages and injunctive relief against all defendants except for Northeast, against whom only injunctive relief is sought.

Defendants do not dispute that the cartel agreements at issue violate the antitrust laws save for one primary defense: that they were compelled by the Chinese government to fix prices. They have filed a motion for summary judgment based upon that defense and the related doctrines of comity and act of state.

The three doctrines upon which defendants rely recognize that a foreign national should not be placed

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2. There are also other defendants that do not manufacture vitamin C, including JSPC America, Inc. ("JSPCA"), a subsidiary of JJPC, Shijiazhuang Pharmaceutical (USA) ("Shijiazhuang"), Inc., an affiliate of Weisheng, and China Pharmaceutical Group Ltd. ("China Pharmaceutical"), the owner of Weisheng and Shijiazhuang. The complaint also names North China Pharmaceutical Group ("NCPC Group Corp."), North China Pharmaceutical Group Co. Ltd., ("NCPC Ltd.") and North China Pharmaceutical Group Corporation Import and Export Trade Co., Ltd. ("NCPC I&E") (collectively "North China defendants"). Welcome, is a partially-owned subsidiary of NCPC Ltd., which is, in turn, a partially-owned subsidiary of NCPC Group Corp. NCPC I&E is an indirectly owned subsidiary of NCPC Group Corp. that purchases vitamin C from Chinese companies including Welcome.

between the rock of its own local law and the hard place of U.S. law. However, that concern is insufficient to protect defendants from their acknowledged violation of the antitrust laws because, here, there is no rock and no hard place. The Chinese law relied upon by defendants did not compel their illegal conduct. Although defendants and the Chinese government argue to the contrary, the provisions of Chinese law before me do not support their position, which is also belied by the factual record. I decline to defer to the Chinese government's statements to the court regarding Chinese law.

Accordingly, defendants' motion for summary judgment is denied.

(1)

BACKGROUND

By November 2001, defendants, who faced much lower manufacturing costs than their foreign competitors, had captured over 60% of the worldwide market for vitamin C. China's share of vitamin C imports to the United States rose from 60% in 1997 to over 80% by 2002. Around this time, a number of foreign competitors discontinued or reduced production.

It is not disputed that defendants fixed prices and agreed on output restrictions. Defendants are members of the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("the Chamber"). Many of the agreements at issue were reached at meetings

of the Chamber and appear to have been, at the very least, facilitated by the Chamber. Defendants, however, contend that the Chamber is a government-supervised entity through which the Chinese government exercises its regulatory authority over vitamin C exports and that all of the agreements at issue were compelled by the Chinese government.

After plaintiffs filed suit, defendants moved to dismiss the complaint, invoking the foreign sovereign compulsion defense, the act of state doctrine and the doctrine of international comity. The Ministry of Commerce of the People's Republic of China ("The Ministry"), which is the highest authority in China authorized to regulate foreign trade,[3] filed an amicus brief in support of defendants' motion, explaining the Chinese government's regulation of vitamin C exports. The Ministry "formulates strategies, guidelines and policies concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system." The Ministry is equivalent to a cabinet level department in the United States. According to the Ministry, defendants' actions were compelled by the Chinese government.

Judge David G. Trager denied defendants' motion to dismiss, finding the record, at that time, to be "simply too ambiguous to foreclose further inquiry into the

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3. The Ministry was originally known as the Ministry of Foreign Trade and Economic Cooperation (or "MOFTEC"). For ease of reference, "the Ministry" is used to refer to both entities.

voluntariness of defendants' actions."[4] *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008). With the benefit of some discovery, plaintiffs had offered evidence suggesting that defendants' agreements may have been voluntary. In addition, Judge Trager was concerned with the possibility that the cartel and purportedly compulsive governmental regulations at issue had been established at the behest of defendants and the Chinese government had simply given its "imprimatur."

Defendants now move for summary judgment on their three related defenses. Although the initial complaint in this suit was filed in January 2005, the operative complaint for the purposes of the instant motion covers the time period from December 1, 2001 through December 2, 2008.

(2)

CHINESE LAW

I. China's Economic Transition and the Establishment of the Chambers

In 1978, China began to transition from a planned economy to a "socialist market economy." During the planned economy era, the control of foreign trade was centralized under the Ministry and all foreign trade was conducted through state-owned import and trade companies according to state trade plans. After some

4. This case was reassigned to me in January 2011 following the death of my dear colleague, Judge Trager.

reforms in the mid-1980's led to aggressive forms of competition, the government imposed new administrative controls, which involved the establishment of the various China Chambers of Commerce for Import and Export ("Chambers"), including the Chamber. According to defendants' Chinese law expert, Professor Shen Sibao,[5] the formation of the Chambers was part of China's "important national policy which requires Chinese exporting companies to 'unite and act in unison in foreign trade.'"

The authority to regulate import and export commerce was eventually transferred from the state-owned trading companies to these Chambers. When the Chambers were created, they were staffed with personnel transferred directly from the government.

The Chambers were given both governmental functions, which had previously been performed by the Ministry, and private functions. The governmental functions included, *inter alia*, responding to foreign anti-dumping charges and industry "coordination." The private functions of the Chambers included organizing trade fairs, conducting market research and "mediating" trade disputes.

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5. Plaintiffs do not have a Chinese law expert and, instead, attempt to make their case by relying on the plain language of: (1) directives issued by the Ministry; (2) charter documents of the Chamber and its sub-committee that dealt with the vitamin C; and (3) public statements made by the Chinese government and various Chambers to the World Trade Organization ("WTO") and the United States government.

Appendix C

II. 1996 Interim Regulations

The first governmental directive cited in the Ministry's brief is the Interim Regulations of the Ministry on Punishment for Conduct of Exporting at Lower-than-Normal Price ("1996 Interim Regulations"), which were promulgated on March 20, 1996.[6] The 1996 Interim Regulations, which applied to all export products produced in China, address the Ministry's power to punish enterprises for exporting at "lower-than-normal" prices. Potential punishments include "a notice of criticism" and monetary fines. According to the regulations, a normal price includes the costs for producing the product as well as "reasonable profit." The Ministry could request the Chambers to investigate alleged violations of the regulations. The 1996 Interim Regulations also note that "[a]ll export enterprises shall . . . follow the coordination by various chambers of commerce for import and export trade, and set export prices which are suitable in countries to which the goods are exported."

Although not raised by either party, according to a recent decision by the World Trade Organization ("WTO"), the 1996 Interim Regulations were formally repealed on September 12, 2010. WTO, Panel Report, WT/DS394/R, WT/DS395/R, WT/DS398/R, *China-Measures Related to the Exportation of Various Raw Materials* (July 5, 2011) ("WTO Panel Report"), ¶ 7.1029 (citing Order No. 2

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6. The record includes various regulatory documents issued by the Ministry that have various titles such as "Regulations," "Decision" and "Notice." These types of documents are collectively referred to herein as "governmental directives."

of 2010 (promulgated by the Ministry on Sept. 12, 2010)). However, in this proceeding before the WTO ("WTO Proceeding"), China asserted that it "ceased to impose . . . penalties [under the 1996 Interim Regulations]" as of May 28, 2008 when "verification and chop," which required export contracts to receive an official seal, was repealed.[7] *Id.* ¶ 7.1031.

III. 1996 Conference and Report

In early 1996, the Ministry held a conference and issued a report addressing problems in the vitamin C industry. Although China's vitamin C industry had rapidly expanded, the industry faced a number of problems including: (1) "violations of export administration regulations" and "the lack of strong administration and coordination of exports"; (2) a glut of capacity and Chinese vitamin C producers; (3) "disorderly" and fierce export competition that resulted in companies "blindly cutting prices"; and (4) threats of foreign anti-dumping suits. To combat these problems, the report recommended restricting production in order to "preserve price," barring expansion of production capacity and consolidating the numerous vitamin C producers.

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7. In the WTO Proceeding, the United States and other countries challenged Chinese export restrictions on certain raw materials. Although vitamin C is not at issue in the WTO Proceeding, one of the raw materials in dispute was, like vitamin C, also subject to verification and chop.

Appendix C

IV. 1997 Notice and 1997 Charter

In November 1997, the Ministry and the State Drug Administration ("SDA") promulgated the Notice Relating to Strengthening the Administration of Vitamin C Production and Export by [the Ministry] and [SDA] (the "1997 Notice"). The purpose of the 1997 Notice was "to rectify the operational order and optimize the operational team of Vitamin C export, realize the scale-operation on export, improve the competitiveness of our Vitamin C products in the international market, promote the healthy development of Vitamin C export and maintain the interest of our country and enterprises . . . ."

The regulatory scheme under the 1997 Notice had three primary components. First, the 1997 Notice required export licenses, which were granted by the government based on certain qualifications, including prior production output. Second, the Ministry set export quotas for the total volume of vitamin C that could be exported and export quotas for each individual company. Third, the 1997 Notice generally directed the Chamber to "improve the coordination on Vitamin C export [,]... supervise [the implementation of the 1997 Notice], and timely report to [the Ministry] about the relevant issues and problems." To meet these goals, the Chamber was required to establish the Vitamin C Subcommittee (the "Subcommittee"). All exporting enterprises were required to participate in the Subcommittee and to "subject themselves to the coordination of the [the Subcommittee]." The Subcommittee was directed to, *inter alia*, establish a mandatory minimum export price. Under the 1997 Notice,

"the Ministry itself did not decide what specific prices should be," leaving that to the Subcommittee.

Only enterprises that followed the coordinated price and volume quotas would receive export licenses. For violations of the "relevant provisions" of the 1997 Notice, including "competing at low price and reducing price through any disguised means," enterprises could be punished through a reduction of their export quotas and even complete revocation of their export licenses.

In October 1997, the Subcommittee enacted a charter (the "1997 Charter") in accordance with the charter of the Chamber and the 1997 Notice.[8] According to the 1997 Charter, the Subcommittee was organized around certain tenets, including "complying with laws of the country, implementing and executing the state policies and regulations on foreign trade [and] maintaining orderly export of Vitamin C products . . . ." The Subcommittee was to perform "coordination, direction, consultation, service and supervision & inspection functions over its members. It bridges and ties the enterprises and the government." Under the 1997 charter, the Subcommittee was supposed to, *inter alia*, supervise the implementation of export licenses, advise the Ministry on export quotas and "coordinate and administrate market, price, customer and operation order of Vitamin C export."

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8. The 1997 Charter was enacted on October 11, 1997, which is prior to the promulgation of the 1997 Notice (November 27, 1997), the effective date of the 1997 Notice (January 1, 1998) and the Ministry's approval of the Subcommittee (March 28, 1998).

Appendix C

According to the 1997 Charter, "[o]nly the members of the Sub-Committee have the right to export Vitamin C" and to obtain a "Vitamin C export quota." In return, members of the Subcommittee were obligated to "comply with various directives, policies and regulations with respect to foreign trade, comply with the Charter and regulations of [the Subcommittee] and to implement Sub-Committee's resolution." Specifically, the members were required to "[s]trictly execute export coordinated price set by the Chamber and keep it confidential."

For violations of the 1997 Charter or any resolution issued by the Subcommittee, a member could be punished through a warning, open criticism and even revocation of its membership. In addition, the Sub-Committee would "suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member."

On March 21, 2002, the Ministry abolished the 1997 Notice and other regulations,

> [i]n order to adapt to the new situation of our country's opening-up to the outside world, to further establish and improve the legal system of the socialist market economy, to earnestly perform the promises of our country's entry to the WTO, to accelerate the transformation of the functions of the government and to improve the level of administration ....

Only a few months earlier, the Ministry had issued regulations ("the 2002 Regulations"), which repealed, as

of January 1, 2002, another directive that had subjected vitamin C and other products to export licensing and export quotas beginning on December 29, 1992 (the "1992 Interim Regulations").

V. 2002 PVC Notice and the Institution of Verification and Chop

Shortly after abolition of the 1997 Notice, the Ministry and the General Administration of Customs ("Customs") issued a notice on March 29, 2002 establishing an export regime referred to as "Price Verification and Chop" (the "2002 PVC Notice"). The 2002 PVC Notice became effective on May 1, 2002. Thirty categories of products, including Vitamin C, were now subject to "Price Verification and Chop . . . by the chambers, and [were] no longer subject to supervision and review by customs." "Following the adjustment made under [the 2002 PVC Notice], the relevant chambers" were required to submit to Customs, by April 20, 2002, "information on industry-wide negotiated prices." According to the Ministry, under verification and chop, Customs would only permit export if the relevant contract was reviewed by the Chamber and received a "chop," which is a special seal that the Chamber would affix to the contract indicating its legality (and, more importantly, the absence of which would indicate its illegality.)

The 2002 PVC Notice explains that:

> [the Ministry] and [Customs] have made the decision to adjust the catalogue of export

> products subject to price review by customs for year 2002, in order to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed . . ., promote industry self-discipline and facilitate the healthy development of exports.

According to the 2002 PVC Notice, "[t]he adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline."

The 2002 PVC Notice also provides that "[g]iven the drastically changing international market, the customs and chambers may suspend export price review for certain products with the approvals of the general members' meetings of the sub-chamber (coordination group) and filing with [Customs]" (hereinafter "Suspension Provision").

VI. 2003 Announcement

On November 29, 2003, the Ministry issued a new directive, effective January 1, 2004, that continued the verification and chop system (the "2003 Announcement"). This was done "[i]n order to maintain the order of foreign trade and create a fair trade environment and in response to the demands of the industries engaging in export and import, as well as on the basis of the coordination by relevant industrial associations . . . ."

Appendix C

According to the 2003 Announcement, "[e]ach [Chamber] shall . . . strictly observe the Procedures for Implementing the Verification and Chop System on Export Commodities" ("2003 Procedures"), which are attached to the 2003 Announcement. The 2003 Procedures, which explain the verification and chop process in greater detail,[9] state:

> exporters shall deliver . . . the export contracts . . . to the relevant Chambers for verification before Customs declaration. If it is verified that the contracts are correct, the Chambers shall fill in the Verification and Chop Form of [the relevant Chamber] and affix the counter-forgery V&C chop at the designated block of the V&C Form and to the export contacts at the blocks *where prices and quantities are specified*, and then deliver them back to the exporters.
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> * * * *
>
> The Chambers *shall verify the submissions by the exporters based on the industry agreements* and in accordance with the relevant regulations promulgated by [the Ministry] and [Customs]. . . . The relevant Chambers shall file the industry agreements with [the Ministry] and [Customs] within 10 days after the public announcements [for such industry agreements] are made . . . .

9. Although the 2002 PVC Notice indicates that there were similar explanatory regulations related to the 2002 PVC Notice, those regulations are not part of the record.

> (Emphasis added). If a contract did not have a chop, Customs would not accept the contract and the goods could not be exported. Enterprises that forged the chop were to "be punished by the [Chambers] according to relevant rules."

The 2003 Procedures also contain a provision addressing non-members, which provides that "[f]or V&C Applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters."

VII. 2002 Charter

On June 7, 2002, after the 2002 Notice became effective, the Subcommittee approved a revised charter (the "2002 Charter"). The 2002 Charter describes the Subcommittee as "a self-disciplinary industry organization jointly established on a voluntary basis by those [Chamber] members which conduct import and export of vitamin C." According to the 2002 Charter, the purposes of the Subcommittee are:

> to observe the state laws, regulations and the Articles of Association for [the Chamber], to coordinate and guide the Vitamin C import and export business as well as related activities, to provide consultation and services to its members and relevant governmental departments, to maintain the normal working order of vitamin C import and export operations, to ensure fair competition, to protect the national interest and the legal rights and interests of its members,

and to promote the healthy development of the vitamin C import and export trade.

The 2002 Charter also provides that: "The Subcommittee shall coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry, maintain the normal order for vitamin C import and export operations, and protect the interests of the state, the industry and its members" According to the 2002 Charter, "obligations" of members include "[i]mplement[ing] the resolutions and agreements of the Subcommittee" and "[a]ccept[ing] the coordination of the Subcommittee."

Although the 2002 Charter is, in many respects, similar to the 1997 Charter, there are some differences. Most notably, the 1997 Charter never states that the Subcommittee was established on a "voluntary basis." In addition, unlike the 2002 Charter, the 1997 Charter provides that "[o]nly the members of the Sub-Committee have the right to export Vitamin C" and to obtain a "Vitamin C export quota." These differences between the two charters make sense given that, under the 2002 PVC Notice and 2003 Announcement (collectively the "2002 Regime"), membership in the Subcommittee was no longer required in order to export vitamin C.

The penalty provisions in the two charters also differ. Although the 1997 Charter provided that "[t]he Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member," this provision is absent from the

2002 charter. In addition, although the 1997 Charter and the 2002 Charter both provide that the Subcommittee can discipline members through public criticism, a warning or termination of membership, because non-members can export under the 2002 Regime, revocation of membership would not necessarily have the same effect under the 2002 Regime. The 2002 Charter also includes an enforcement provision that is not included in the 1997 Charter. The 2002 Charter provides that "[i]n order to monitor the implementation of industry self-disciplinary agreements, coordination plans, or industry resolutions, upon approval by relevant members, the Subcommittee can collect a security deposit in the specified amount for breach of agreement."

Finally, although the Subcommittee includes both representatives from the Chamber and representatives from the members, the 2002 Charter appears to require majority voting by the members alone to take any action.

VIII. May 2002 Agreement

On May 25, 2002, less than two weeks before the 2002 Charter was passed, the Subcommittee met to discuss revising the 1997 Charter. At this meeting, the Subcommittee agreed that that "[a] company, without being a member of the VC Chapter, can export VC (but the export quantity needs to be confirmed by other companies)" (hereinafter the "May 2002 agreement"). The May 2002 agreement, however, is not reflected, in any way, in the 2002 Charter.

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IX. Repeal of Verification and Chop

Although not raised by either party, according to the WTO Panel Report, it appears that the 2003 Announcement was formally repealed on May 26, 2008. WTO Panel Report, ¶¶ 7.1013, 7.1056-1057 (citing Communication ([Ministry] and [Customs] (2008) No. 33, May 26, 2008)).

X. Charter of the Chamber

The Chamber's own charter (the "2003 Chamber Charter") contains language similar to that found in the Subcommittee's 2002 Charter. The Chamber describes itself as "a national-wide and self-disciplined social entity voluntarily organized by [importers and exporters of] medicines and health products." According to the 2003 Chamber Charter, the objectives of the Chamber are [*inter alia*] to "coordinate and guide the import and export of medicines and health products . . . maintain the order of foreign trade, defend fair competition, secure interests of the state and the trade [and] safeguard lawful rights and interests of member organizations." Potential penalties for violations of the 2003 Chamber Charter, "coordination regulations or the Chamber's directives" mirror those found in the 2002 Charter.

With regard to vitamin C, other literature issued by the Chamber along with the 2003 Chamber Charter indicates that the Chamber's Pharmaceutical Department has a number of responsibilities, including "help[ing] the government to manage the import and export of some

products, such as Vitamin C ...." and "coordinat[ing] and manag[ing]" various sub-chambers, including the Vitamin C sub-chamber.

XI. Relationship between the Ministry and the Chamber

Three sources address the relationship between the Ministry and the Chamber: (1) "[The Ministry] Measures for Social Organizations, Measure for Administration over Foreign Trade and Economic Social Organizations," dated Feb. 26, 1991 ("1991 Measures"); (2) the "Notice of [the Ministry] regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters," dated September 23, 1994 ("1994 Notice"); and (3) the 2003 Chamber Charter.

Pursuant to the 1991 Measures, the Ministry has a supervisory role over organizations "established with coordination and industry regulation functions." This supervisory role includes responsibility for the "daily management" of the organizations, which the 1991 Measures define to include examining the structure, personnel and budget of the organizations and formulating the salaries and benefit plans for the organizations. The 1991 Measures also state that "[s]ocial organizations established with coordination and industry regulation functions as authorized by the [the Ministry] must implement the administrative rules and regulations relating to foreign trade and the economy."

The 1994 Notice, and the regulations annexed thereto, specify that: (1) "[t]he candidates for the senior positions of the chamber are recommended by [the Ministry] (or recommended by over 1/3 of the chamber's member companies and approved by [the Ministry]) and then elected or dismissed by the general meeting of members"; (2) the Chamber's employees are to be chosen primarily from member organizations or the competent authorities in charge of foreign trade; (3) the Chamber's headcount of employees must be verified and approved by the Ministry and then by the Ministry of Civil Affairs; and (4) the Ministry must verify and approve the Chamber's budget for total employee salaries.

The 2003 Chamber Charter and accompanying literature also address this relationship, stating that the Chamber implements the government's policies, regulations and "authorization," and "accepts the guidance and supervision of the responsible departments under the State Council." In addition, mirroring the requirements set out in the 1994 Notice, the 2003 Chamber Charter provides that "the candidates for the president, vice-presidents and secretary-general [of the Chamber] may be recommended by the competent authorities, or be recommended jointly by more than one third of members and approved by the competent authorities."

XII. WTO and Public Trade Documents

In public statements to the WTO and the United States government, the Chinese government has made representations regarding its regulation of exports

generally as well as its specific regulation of vitamin C exports. *See* Report of Dr. Paula Stern ("Stern Report") (identifying such statements).

In certain documents, China represented that, as of January 1, 2002, it gave up "export administration . . . of vitamin C." In one document, under the heading "any restrictions on exports through non-automatic licensing or other means justified by specific product under the WTO Agreement or the Protocol," China represented that "[f]rom 1 January 2002, China gave up export administration of . . . vitamin C." WTO, Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China, G/C/W/438 (2002)[10]; *see also* Stern Report at 7 (citing WTO, Statement by the Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade and Goods, G/C/W/441 (2002), which states, under the heading "[n]on-automatic export licensing requirements under WTO agreement and accession commitments," that "[f]rom January 1, 2002, China gave up export administration of . . . vitamin C."). These WTO documents were not before Judge Trager at the motion to dismiss stage.

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10. This document is not directly cited in the Stern Report, on which plaintiff rely. The Stern Report cites to a "Trade Policy Review" conducted by the WTO, which states that "[o]n January 1, 2002, China abolished export quotas and licenses for, inter alia, . . . Vitamin C." Stern Report at 8 (citing WTO, Trade Policy Review, WT/TPR/S/161Rev.1 (2006)). In support of this proposition, the "Trade Policy Review" cites to WTO, Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China, G/C/W/438 (2002).

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XIII. The Ministry's Statements in the Instant Litigation Concerning "Self-Discipline"

In an additional statement submitted on summary judgment (the "2009 Statement"), the Ministry describes the Chinese "system of self-discipline." According to the 2009 Statement:

> [The system of 'self-discipline'] has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such coordination, or for non-compliance with self-discipline, including forfeiting their export right.

According to the Ministry, vitamin C exporters were governed by self-discipline regulation, the objectives of which were "to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition." The 2009 Statement also

discusses the Ministry's delegation of authority to the Chamber regarding self-discipline.

XIV. 1998 Opinions

In discussing the notion of "self-discipline prices," Professor Shen and a number of commentators cite to an August 1998 directive issued by the State Economic and Trade Commission ("SETC") entitled "Opinions On Self-Discipline Pricing For Certain Industrial Products" ("1998 Opinions"). Wang Xiaoye, The Prospect of Anti-Monopoly Legislation in China, 2002 Wash. U. Glob. Stud. L. Rev. 201, 208-09; Shen Report ¶ 70. The 1998 Opinions, which only involved domestic prices, "demanded that the producers of certain industrial products observe the minimum price limits set by their respective trade associations." Wang Xiaoye, 2002 Wash. U. Glob. Stud. L. Rev. at 208; *see also* Scott Kennedy, The Price of Competition: Pricing Policies and the Struggle to Define China's Economic System, The China Journal No. 49, 19 (Jan. 2003). The minimum prices were based on a product's average costs in the industry. Kennedy, The China Journal No. 49, 19; *see also* Wang Xiaoye, 2002 Wash. U. Glob. Stud. L. Rev. at 209.

(3)

ACTIONS OF CHINESE MARKET PARTICIPANTS

I. The 1997 Regime

Between the promulgation of the 1997 Regime and April 2001, the Subcommittee held a number of meetings

where defendants reached agreements on price and export quotas. These meetings were attended by officials from both the Chamber and the Ministry.

In 1997, the price of vitamin C was $4.4/kg. At some point, defendants set the minimum price at $5.3/kg and the price rose to at least $5/kg. However, between May 2000 and December 2001, there was a "price war," which resulted in export prices dropping to less than $2.8/kg. This appears to have been caused by an expansion in China's production capacity that stemmed from an apparent "misunderstanding" at a 1999 Subcommittee meeting.

In December 2000, the minimum export price was $5.1/kg. However, as it appears that none of the defendants were following that price, defendants agreed to "nullify" that price and submitted this agreement to the Ministry "for approval."[11]

At a Subcommittee meeting in April 2001, the attendees discussed a drop in the price and the recent expansion in China's production capacity. At one point during the meeting, the representative from the Ministry informed the members that:

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11. Although the Ministry's counsel suggested at oral argument that, under both the 1997 Regime and the 2002 Regime, the Ministry had "plenary authority" over prices and the power to accept or reject a price, there is no evidence of any industry agreements reached under the 2002 Regime being submitted to the Ministry "for approval." The 2002 PVC Notice, however, does require the Chamber to file an "annual price review report" with the Ministry and Customs.

> Even though VC is not a resource product, it has been strictly regulated since 1997. Regarding the effects of current regulations, generally speaking, the regulation has not been very successful. [The Ministry] attaches importance to the establishment and development of the Chamber, and requires sub-committees to act proactively. Enterprises need to obey the industry agreements and industry rules. When enterprises are maximizing their profits, they also need to consider the interest of the state as a whole.

At the meeting, the manufacturers agreed to reduce the minimum export price from $5.10/kg to $3.20/kg, presumably in accordance with the agreement at the December 2000 meeting. The minutes go on to state that: "However, because the manufacturers have not agreed on the enforcement mechanisms of the verification and chop system, it remains a major question whether this price limit can be enforced effectively."

II. Transition to the 2002 Regime

In September and November 2001, the Ministry learned that the European Union was considering bringing an anti-dumping suit against the Chinese vitamin C manufacturers. This information was forwarded to the Chamber. On one document, handwritten notes, apparently from Ministry officials, state: (1) "[p]lease

review and get prepared"; (2) "please review and address it"; and (3) "[p]lease investigate this matter."[12]

On November 16, 2001, the Chamber held a meeting with defendants.[13] At the meeting, defendants, "by way of hand voting," agreed to raise the "coordinated export price" to $3/kg starting on January 1, 2002. Defendants also agreed to limit the total export volume for 2002 to 35,500 tons (with each company receiving individual export volume allocations) and to not expand their production capacity. Defendants' agreement was "aimed at enhancing the self-discipline of the industry." In December 2001, the Chamber convened another meeting amongst defendants to discuss implementing this agreement.

Not only is there no affirmative evidence of compulsion in the documents discussing this agreement, but these documents also suggest, on their face, that this

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12. Defendants' 56.1 Statement does not discuss any of the events that occurred after this information was forwarded to the Chamber. Although defendants' briefs discuss a few of those events in a handful of scattered passages, defendants contend that all of the facts relied on by plaintiffs are "either irrelevant or, in any event, do not prevent entry of judgment in Defendants' favor" because the instant motion should be decided strictly as a matter of a law.

13. The meeting was presided over by Qiao Haili, a Chamber official and Secretary-General of the Subcommittee, who appears to have attended all of the formal Subcommittee meetings held under the 2002 Regime. Although no representative from the Ministry was present at the November 16, 2001 meeting, minutes of the meeting and a copy of the agreement reached at the meeting were forwarded to the Ministry.

agreement was voluntary.[14] One states, for example, that the participants "concluded that Chinese Vitamin C manufacturers are absolutely capable of realizing the self-discipline of the industry" because (1) China has lower gross costs; (2) "production of Vitamin C in China is highly centralized in four manufacturers and thus, it is relatively easy to reach unison within the industry"; (3) supply is in balance with demand and price declines are psychological; and (4) there is strong growth in demand for Vitamin C as an "irreplaceable product." Another states:

> [a]nalysis from persons within the industry was that the enterprises were able to sit down together at this particular time because VC prices had reached rock bottom, and no one could sustain a further slide; the next reason was, because the country had opened up the commercial products business from a free competition aspect the enterprises were impelled and had no choice but to seek industry self-regulation.

Similarly, a summary of the December 2001 meeting from Chamber's website notes that:

> through efforts by the Vitamin C Sub-Committee of [the Chamber]. . . domestic manufacturers were able to reach a self-

14. Defendants do not contest the admissibility of any of the documents relied on by plaintiffs. In addition, not only have plaintiffs offered evidence establishing the admissibility of many of the documents, but, in some instances, witnesses explicitly confirmed at their depositions that the documents accurately reflected what occurred.

> regulated agreement successfully, whereby they would voluntarily control the quantity and pace of exports to achieve the goal of stabilization while raising export prices. Such self-restraint measures, mainly based on 'restricting quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically' have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention. Beginning on May 1, 2002, vitamin C was listed as a product requiring price reviews by China's Customs and a seal of pre-approval by the [Chamber], which has provided powerful oversight and safeguards for the implementation of self-restraint agreements among domestic manufacturers.

(Emphasis added).[15]

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15. This is the only factual evidence in the record that the Ministry's submissions explicitly address. In its amicus brief, the Ministry asserted that:

> in the context of the Ministry's regulation of the vitamin C industry through the Chamber[,] . . . the characterizations by the Chamber of the conduct as 'self-restraint' and 'voluntary' are unremarkable. The vitamin C industry was under a direct Ministry order to reach a 'coordinated' agreement in order to stabilize export pricing. Thus, it is understandable that the Chamber would express its pleasure publicly that the parties were able to comply with the Ministry' order to coordinate pricing and quantities on their own

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Some documents discussing the November and December 2001 meetings imply that verification and chop was used to enforce the parties' agreement. However, none of these documents clearly state that defendants' agreements restricting output were enforced through verification and chop. In fact, the document quoted above explicitly refers to "price reviews."

III. The 2002 Regime

A. Meetings and Agreements

Between the beginning of 2002 and the filing of the initial complaint on January 26, 2005, the Subcommittee held numerous "coordination" meetings where defendants reached agreements regarding price and output. There were also a number of Subcommittee meetings where no agreements were reached.[16]

B. Evidence of Voluntariness

Similar to the record regarding the November 2001 agreement, the relevant documents contain no affirmative evidence of compulsion and, a number of these documents,

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(i.e., 'voluntarily' and in 'self-restraint') as opposed to requiring more direct Ministerial intervention.

16. During the pre-filing period, a representative of the Ministry only attended one Subcommittee meeting, which addressed dumping concerns.

on their face, suggest voluntariness.[17] For example, one documents notes:

> In 2003, it is expected that the export quota management system will be kept and continue to play a positive role. But, because the international market has turned for the better considerably when compared with the situation in early 2002, the *willingness and actual effectiveness of various manufacturers to cooperate will be lower than the days when the market had a difficult time.*

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17. The relevant documents make numerous references to "coordination" and "self-discipline." According to the Ministry and Professor Shen, terms such as "coordination," "industry self-discipline" and "voluntary self-restraint" have particular meanings in the context of China's regulatory regime. Thus, the use of such terms may not, in and of themselves, necessarily indicate voluntariness. However, beyond the use of such terms, there is independent factual evidence in the record indicating voluntariness. For example, irrespective of what "industry self-discipline" may mean, there is evidence in the factual record, discussed infra, indicating that, in June 2004, Weisheng violated a shutdown agreement without penalty and that its decision to agree to a new shutdown agreement stemmed solely from problems that Weisheng had with its production line (and not, as defendants' employees now claim, from any compulsion by the Chamber). Furthermore, there does not appear to be any compulsion inherent in "self-discipline" and related terms. Rather, any compulsion is dependent on the specifics of the governmental directives in effect at the time. According to the 2009 Statement, self-discipline regulation required vitamin C exporters to "to coordinate among themselves on export price and production volume in compliance with China's relevant rules and regulations." Therefore, references to "self-discipline" would appear to imply compulsion only if the specific governmental directives underlying the 2002 Regime involved compulsion.

(Emphasis added). Similarly, a speech made two days after the instant suit was filed states:

> These VC enterprises, mediated by the [Chamber], took measures [in 2004] to limit production to protect price and to ensure a 'soft-landing' of the price plunge, but in the long run, such allegiance is vulnerable and will easily succumb to the temptation of profit and before the test of time.

C. Minimum Price

According to defendants' interrogatory answers and the deposition testimony of Wang Qi, a JJPC executive, beginning in May 2002, the minimum price was $3.35/kg throughout the relevant period. However, there is other evidence indicating that, at certain times, higher minimum prices were in effect or no minimum price was in place. An official notice issued by the Chamber in early 2003 indicates that, at the time, there was no minimum price in effect for Vitamin C (or, possibly, that verification and chop had been suspended). Although the notice lists minimum prices for two other products subject to verification and chop, the minimum price field for vitamin C is blank.

Later in the spring of 2003, defendants set a minimum price above $3.35/kg and violated it without punishment. After the price of vitamin C rose in the spring of 2003 to around $15/kg, the price began to rapidly drop. Although defendants agreed at a June 2003 Subcommittee meeting to set a "floor price" of $9.20/kg, this price was not

followed; within a few weeks, every manufacturer was quoting prices below this "floor" price. At a meeting in July 2003, the $9.20/kg price was cancelled and the verification and chop price was restored to $3/kg.

It should also be noted that Ning Hong, the primary person at NEPG responsible for negotiating vitamin C prices with American customers, made a number of statements at his deposition suggesting that defendants were rarely, if ever, required to follow the minimum price under verification and chop. Additionally, there is other evidence indicating that NEPG made sales below the minimum price in May and June 2002 and that defendants consistently sold below the minimum price during substantial portions of 2005 and 2006.

D. Weisheng's Violation of June 2004 Shutdown Agreement

On May 12, 2004, the Subcommittee held a meeting to coordinate an upcoming June production stoppage that defendants had previously agreed to undertake. However, at the meeting, Weisheng announced that it would not participate in the production stoppage. According to Kong Tai, the general manager of JJPC, Weisheng "unilaterally tore up the agreement" for the planned June shutdown. "[U]sing the pretext of conducting a trial run," Weisheng announced it would stop production on an old production line, but not on its "new 15,000-ton production line, where . . . a trial run had been formally launched" four days earlier. "As a result, the agreement fell apart and plans for ceasing production in June were canceled."

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On May 24, 2004, Welcome, Northeast and JJPC met and decided on a new shutdown agreement, which appears to have hinged on whether Weisheng would also participate. At a May 28, 2004 internal JJPC meeting, Kong Tai suggested that the possibility of Weisheng participating "was not great." Similarly, an undated NEPG document doubted whether defendants could execute the agreed June shutdown as planned and noted that if the agreement were not followed "the impact on the market will be very serious."[18]

On June 15, 2004, defendants attended a "VC regulation meeting." According to a monthly report prepared by Wang Qi, "[a]t this meeting, Weisheng . . . re-proposed the agenda for quoting while stopping production, *because their production line had problems.*" (Emphasis added).

Defendants' employees asserted, at their depositions, that the Chamber called this meeting, penalized Weisheng for its actions and required Weisheng to agree to the shutdown plan reached at the June 15 meeting. According to Feng Zhen Ying, an employee of Weisheng, when Weisheng initially refused to participate in the shutdown,

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18. This document's additional prediction that if the shutdown agreement could be "executed as scheduled .... it will have a profound significance for the confidence in forming a continuous mechanism similar to the 'price control mechanism' in the future," is further evidence of the voluntariness of defendants' agreements, particularly regarding output restrictions. Moreover, this document indicates that defendants viewed the mechanism for controlling prices as distinct from the mechanism for restricting output.

Weisheng was "penalized by the [Chamber]," which did not allow Weisheng to run its new production lines, even for dry trial runs. According to Wang Qi, when Weisheng failed to follow the original agreement, "the allocation of their quotas were delayed." Feng Zhen Ying also testified that although "Weisheng had a different opinion about the proposed production shutdown" "under the mandatory requirement of the [Chamber, Weisheng] eventually went along" and shut down production. He asserted that "it was mandated by the government that all manufacturers have to shut down together." Similarly, Wang Qi testified that, "the [Chamber] forced Weisheng to come up with a new plan, with a plan for stoppage . . . . [a]nd forced Weisheng to express . . . consent to this stoppage of production." None of the documentary evidence, however, supports this testimony.

It should also be noted that, at his deposition, Wang Qi admitted that the original shutdown agreement that Weisheng breached did not contain "any clear provisions for penalty." This apparently led someone (perhaps Wang Qi himself) to conclude that subsequent production shutdown agreements should include "very clear cut [penalty] conditions." Relatedly, Wang Qi also testified that, at the time of Weisheng's breach, the Chamber had never considered how to address violations of its "mandatory instructions."

Even after defendants agreed to the new shutdown agreement following Weisheng's breach, defendants were still predicting fierce price competition and even thought that it was possible that prices would fall below costs.

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IV. Post-Filing Evidence

There are numerous documents in the record created by defendants after the initial complaint in this case was filed on January 26, 2005. These documents indicate that defendants continued to reach agreements in the post-filing period. According to minutes from an April 19, 2005 meeting, at the meeting, Qiao Haili stated that: "[t]he recent antitrust lawsuit is unprecedented, but we shall not suspend the coordination mechanism of the VC industry in our country. If we fail to coordinate, the price will drop and we will face more fearful consequences: the falling price will further trigger antidumping lawsuits . . . ."

Plaintiffs suggest that a fact-finder could conclude that the post-filing documents were crafted (or, at the very least, that the actions described in the documents were taken) to support defendants' litigation position. Both the timing of these documents and the substance of certain documents could support such an inference.[19] The

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19. In a November 2005 e-mail, Wang Qi's writes:

> This act of deciding production or prices based on coordination is a kind of monopoly whatever the reasons. However, I believe we should not have any worry since the [Ministry] is a friend of the court in the lawsuit. If we won the lawsuit, it would be hard for foreigners to make more trouble. Even if we lost the case, the government would take the foremost part of responsibility. After all, *we need to do many things a more hidden and smart way.*

(Emphasis added). Also, a December 2005 NEPG report states "must avoid strategies that would appear counter to sales growth and *thus speak not further about the antitrust lawsuit.* (Emphasis added).

above notwithstanding, some evidence from this period still warrants brief discussion.

A. Potential Change in Chinese Law

Although the record does not contain any governmental directives issued after the 2003 Announcement, one post-filing document suggests that the Chinese law governing vitamin C exports changed after the filing of the instant suit. According to the minutes of a November 16, 2005 Subcommittee meeting, at the meeting, Qiao Haili stated that: "Recently Premier Wen Jiabao had an instruction on the enhancement of industrial self-regulation. The Secretary 2d Bureau under the State Council had conducted an analysis aiming at VC, which also asked for resolving the legal status issue of the industrial self-regulation."[20] Neither Premier Wen Jiabao's "instruction" nor the Secretary's analysis is part of the record.

B. Evidence of Voluntariness

Despite the credibility questions surrounding all of the post-filing documents, it should be noted that certain post-filing documents continue to suggest voluntariness. For example, after defendants set a minimum price and agreed to a production shutdown at a May 2005 meeting, Wang Qi's notes remark that, "due to the damage caused by Weisheng last year, it is still an open question as to what extent the consensus made at the

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20. The copy of these minutes in the record includes redacted content both directly before and directly after this quotation.

meeting will be implemented. We should have a sober estimate of the situation." Also, a December 2005 NEPG report concerning marketing and sales strategy states: "Strengthen self-regulation in the VC industry, but don't rely completely on the 'gentlemen's agreements' of the [Chamber]."

C. Evidence Regarding the Chamber Compelling Agreements in the First Instance

Defendants contend that two post-filing documents evidence the Chamber directing the parties to agree on coordinated production shutdowns. Neither document, however, clearly supports that proposition.

First, defendants point to the minutes of a November 16, 2005 meeting, which defendants assert indicate that "that Qiao Haili of the Chamber was to follow up and determine with the 'Chairman of the Chamber' '[w]hether we should have a production shutdown.'" Although the minutes note that, at the meeting, Qiao Haili stated that the question of whether to conduct a shutdown should be discussed at a follow-up meeting, the minutes do not clearly state that the Chairman of the Chamber would decide this question. Moreover, a November 16, 2005 document authored by Wang Qi discussing the meeting casts doubt on defendants' interpretation of the minutes. This document suggests that JJPC had the ability not to join proposed shutdown if it so desired and explicitly states that the Chamber "once again put forward the

suggestion of coordinated termination of production."[21] (Emphasis added).

Second, defendants cite to a September 2006 internal NEPG report, which states that "various VC manufacturers in China will successively suspend production." This document, however, does not address what, if any, role the Chamber played in the formation of this shutdown agreement.

D. Minimum Price

As noted earlier, there is evidence of defendants making substantial sales below the minimum price during 2005 and 2006.

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21. This document also includes the following cryptic passage, discussing "government relations":

> We are reluctant to admit the fact that the [Chamber] will continue to be a major force in coordinating companies of this industry, particularly in a difficult situation. The role of the [Chamber] as the industrial association will be intensified rather than weakened in the future. Therefore, there is no need for us to go beyond [the] coordination of the [Chamber], which will do no good to our current or future work. The work of the [Chamber] will be supported by the Ministry of Commerce. We should not regard the coordination simply as authoritarianism of the [Chamber]. Not only does this passage raise questions about the voluntariness of defendants' post-filing agreements, but it also suggests, consistent with Qiao Haili's statement, that Chinese law governing vitamin C exports was in flux after the filing of the initial complaint in this case.

E. Use of Verification and Chop to Enforce Output Restrictions

Defendants cite to minutes from a December 2005 meeting indicating that defendants would inspect each other to ensure compliance with a production shutdown agreement and that "[i]f production is not suspended in accordance with the schedule, the Chamber of Commerce will stop issuing export verification and approval seals until the enterprise suspends its production."

There is also other post-filing evidence indicating that verification and chop was used to enforce output restrictions. Ning Hong testified that the Chamber would allocate a certain number of chops to each company and that the company could not exceed that amount. There are also post-filing documents that discuss using "the method of issuing export pre-authorization stamps in order to restrict the export volume."

V. Export Quotas

According to their interrogatory answers, defendants were subject to export quotas at various times since 1997.[22] However, defendants' answers are not entirely consistent as to when such quotas were imposed. Although no export

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22. Although the time period covered by defendants' answers regarding export quotas includes the 1997 Regime, the pre-filing period under the 2002 Regime and the post-filing period under that regime, defendants make no effort to explain, for example, the difference between quotas set under the 1997 Regime and those set during the post-filing period under the 2002 Regime.

quotas appear to have been in place in 2003, 2004 or 2005, export quotas were apparently re-instituted in June 2006.

(4)

INTERPRETING FOREIGN LAW AND DEFERENCE TO STATEMENTS BY FOREIGN GOVERNMENTS

Under Federal Rule of Civil Procedure 44.1, "[d]etermination of a foreign country's law is an issue of law." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998); *see also Kim v. Co-op. Centrale Raiffeisen-Boerenleenbank B.A.*, 364 F. Supp. 2d 346, 349 (S.D.N.Y. 2005). In determining foreign law, courts "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. Disputes among experts regarding foreign law do not create issues of fact. *Rutgerswerke AG and Frendo S.p.A. v. Abex Corp.*, No. 93-cv-2914, 2002 U.S. Dist. LEXIS 9965, 2002 WL 1203836, at *16 (S.D.N.Y. June 4, 2002).

When a foreign government submits a statement regarding its law, courts have taken different approaches as to the weight that should be afforded to such statements.

Prior to the enactment of Rule 44.1, the Supreme Court held that such statements should be considered "conclusive." *United States v. Pink*, 315 U.S. 203, 220, 62 S. Ct. 552, 86 L. Ed. 796 (1942) (accepting as conclusive

declaration from Russian government that nationalization decree was intended to have extraterritorial effect); *see also Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919) (finding statement from Russian government that individual was authorized to act on behalf of government in entering assignment and release was "binding and conclusive in the courts of the United States against that government").

However, more recent authorities, including the Second Circuit and the Justice Department, have moved away from the view that a foreign government's position on its own law is conclusive and precludes any further inquiry.

The Justice Department's current position on this issue is that:

> As a general matter, the Agencies regard the foreign government's formal representation that refusal to comply with its command would [give rise to the imposition of penal or other severe sanctions] as being sufficient to establish that the conduct in question has been compelled, as long as that representation contains sufficient detail to enable the Agencies to see precisely how the compulsion would be accomplished under local law.
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> * * * *

The Agencies may inquire into the circumstances underlying the statement and they may also request

further information if the source of the power to compel is unclear.

1995 Antitrust Enforcement Guidelines for International Operations (promulgated by the Dept. of Justice, April 5, 1995)("Antitrust Guidelines"), at § 3.32 & n. 94, available at http://www.justice.gov/atr/public/guidelines/internat.htm (last visited Sept. 1, 2011).

More importantly, in a recent decision, the Second Circuit held "that a foreign sovereign's views regarding its own laws merit-although they do not command-some degree of deference." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 92 (2d Cir. 2002) (adopting the Indonesian's government's position regarding the ownership, under Indonesian law, of majority of funds in dispute, but reaching a contrary position regarding a portion of the funds). In denying defendants' motion to dismiss, Judge Trager, relying on *Karaha Bodas*, concluded that the Ministry's amicus brief was "entitled to substantial deference, but would not be taken as conclusive evidence of compulsion," particularly given that the plain language of the documentary evidence submitted by plaintiffs directly contradicted the Ministry's position. Judge Trager also noted that, unlike *Karaha Bodas*, both *Pink* and *American Can* were decided prior to the promulgation of Rule 44.1.

Defendants contend that I should not follow *Karaha Bodas* because it did not discuss *Pink* or *American Can*. Defendants also point out that the defendant's brief

in *Karaha Bodas* did not cite to either case and never even argued that "conclusive" deference was required. I disagree.

Karaha Bodas is the law of the Circuit, particularly given that, as Judge Trager noted, one subsequent panel has explicitly relied on *Karaha Bodas* on this issue. *See Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008), *vacated on other grounds*, 130 S. Ct. 3318, 176 L. Ed. 2d 1216 (2010). Also, as Judge Trager noted, *Karaha Bodas* was decided after the promulgation of Rule 44.1. *Cf. Riggs Nat. Corp. & Subsidiaries v. C.I.R.*, 163 F.3d 1363, 1368, 333 U.S. App. D.C. 371 (D.C. Cir. 1999) (citing Rule 44.1 and analogous Tax Court rule and noting the court's "hesitant[ance] to treat an interpretation of law as an act of state [under the act of state doctrine], for such a view might be in tension with rules of procedure directing U.S. courts to conduct a de novo review of foreign law when an issue of foreign law is raised").[23] Furthermore, although *Karaha Bodas* may accord less deference to a foreign government's statement than the Justice Department's position, this is merely a question of degree. *Karaha Bodas* and the Justice Department's position, which explicitly takes *Pink* into account, see Brief for the United States as Amicus Curiae Supporting

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23. One district court decision post-dating Rule 44.1 continued to apply *Pink*'s conclusive deference standard. *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280, 1285-86 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977) (table case). However, that decision, which viewed the relevant inquiry as an "act of state" question, *id.* at 1281, did not discuss the potential impact of the Rule 44.1. *Compare Riggs*, 163 F.3d at 1368.

Petitioners, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, (No. 83-2004), 1985 WL 669667, at *23 ("*Matsushita* Amicus Br.") ("the [foreign] government's assertions concerning the existence and meaning of its domestic law *generally* should be deemed 'conclusive.' *United States v. Pink*, 315 U.S. 203, 220, 62 S. Ct. 552, 86 L. Ed. 796 (1942)") (emphasis added), both acknowledge that a foreign government's statement is not entitled to absolute and conclusive deference in all circumstances and that further inquiry behind that statement is permissible.

It must be noted that, for certain issues, the governmental directives contain language that contradicts the position taken by the Ministry and neither the Ministry nor Professor Shen address the problematic language. In such circumstances, I must consider the plain language of the governmental directives. Although I would consider the notion that an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law, I cannot ignore such plain language without some explanation as to why it should be disregarded.[24]

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24. In different circumstances, I may have requested that the parties and the Ministry further address these provisions. However, defendants and the Ministry have had more than ample opportunity to explain the relevant Chinese law. Notably, in the 2009 Statement, the Ministry's most recent submission, the Ministry elected not to discuss, or cite to, any specific governmental directives or Chamber documents.

Appendix C

(5)

DEFENDANTS' DEFENSES

I. Comity

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.
>
> *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S. Ct. 139, 40 L. Ed. 95(1895).

As Judge Trager's opinion noted, often-cited decisions by the Ninth and the Third Circuits adopted various factors for courts to consider in determining whether to assert extraterritorial jurisdiction in an antitrust suit.[25] *Timberlane Lumber Co. v. Bank of America, N.T. and*

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25. The *Timberlane* factors are:

(1) Degree of conflict with foreign law or policy,

(2) Nationality or allegiance of the parties and the locations or principal places of businesses or corporations,

(3) Extent to which enforcement by either state can be expected to achieve compliance,

(4) Relative significance of effects on the United States as compared with those elsewhere,

(5) Extent to which there is explicit purpose to harm or affect American commerce,

(6) Foreseeability of such effect, and

(7) Relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The *Mannington Mills* factors are:

(1) Degree of conflict with foreign law or policy;

(2) Nationality of the parties;

(3) Relative importance of the alleged violation of conduct here compared to that abroad;

(4) Availability of a remedy abroad and the pendency of litigation there;

(5) Existence of intent to harm or affect American commerce and its foreseeability;

(6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

S.A., 549 F.2d 597, 614 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979).

However, the Supreme Court has not adopted these tests and their continuing validity (or at the very least their proper application) is unclear after the Supreme Court's decision addressing comity in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993), an antitrust suit against British reinsurers. "The only substantial question in *[Hartford Fire* was] whether 'there [was] in fact a true conflict between domestic and foreign law.'" *Id.* at 798 (citation omitted). The Court concluded that no such conflict exists when a defendant can comply with both United States and foreign law, "even where the foreign state has a strong policy to permit or encourage [the conduct that violates American law]." *Id.* at 799. The Court found no such conflict with British law as the defendants were not "required . . . to act in some fashion prohibited by the law of the United

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(7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

(8) Whether the court can make its order effective;

(9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

(10) Whether a treaty with the affected nations has addressed the issue.

States" and there was no claim "that their compliance with the laws of both countries is otherwise impossible." *Id.* The Court declined "to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.*

It is thus not clear that a comity analysis is still permitted in the absence of the type of true conflict envisioned by *Hartford Fire*. *See Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464, 478 (S.D.N.Y. 1997) (holding, in antitrust suit, that a true conflict under *Hartford Fire* is a threshold requirement for any comity analysis), *vacated on other grounds*, 157 F.3d 922 (2d Cir. 1998). However, even assuming that it were, any such analysis would focus exclusively on *Timberlane*'s other factors and would not consider China's encouragement and approval of defendants' price-fixing. As one commenter who strongly supports *Timberlane*'s expansive comity analysis has conceded, after *Hartford Fire*, "litigants are free to make comity arguments relying on the other factors outlined in the cases and the Restatements, but may not rely upon the conflict between national policies, unless the conflict rises to the level of outright compulsion."[26] Spencer

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26. Defendants' only response to *Hartford Fire* is a citation to the Justice Department's antitrust enforcement guidelines, which state that "[i]n deciding whether or not to challenge an alleged antitrust violation, the Agencies would, as part of a comity analysis, consider whether one country encourages a certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies." Antitrust Guidelines § 3.2. The unsurprising fact that the Justice Department still considers these

Weber Waller, Antitrust and American Business Abroad (2009) § 6:21; *see also Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996) (limiting comity analysis to remaining *Timberlane* factors after finding no conflict with foreign law or policy because the Korean design registration system at issue was not compelled by the Korean government).

Unless defendants' price-fixing was compelled by the Chinese government, dismissal on comity grounds would not be justified. Once *Timberlane*'s first factor is excluded from consideration, the instant case essentially becomes no different than any other worldwide price-fixing conspiracy by foreign defendants that includes the United States as one of its primary targets. Although this case could affect foreign relations, these foreign policy concerns stem directly from the degree of conflict between Chinese and American laws and policies.

II. Foreign Sovereign Compulsion

A. Overview

The defense of foreign sovereign compulsion . . . focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states . . . [and] recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's. 584 F.

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factors in exercising its prosecutorial discretion does not indicate that courts may, in direct contradiction to *Hartford Fire*, consider a foreign government's encouragement of conduct in a comity analysis.

Supp. 2d at 551. Although the Supreme Court in *Hartford Fire* did not explicitly discuss the foreign sovereign compulsion defense ("FSC defense") as a distinct doctrine or absolute bar to antitrust liability, the Court recognized that abstention on comity grounds may be warranted where compulsion creates a true conflict. Other courts have recognized compulsion as a distinct defense or as a "[a] corollary to the act of state doctrine," *Timberlane*, 549 F.2d at 606 (reasoning that "corporate conduct which is compelled by a foreign sovereign" is treated as "if it were an act of the state itself.").

In addition to fairness concerns, the FSC defense also acknowledges comity principles by accommodating the interests of equal sovereigns and giving due deference to the official acts of foreign governments. Antitrust Guidelines § 3.32. The fact that a foreign government compels certain activity ordinarily indicates that the activity implicates its "most significant interests." *Matsushita* Amicus Br. at *21. Relatedly, the FSC defense also recognizes "that compelled conduct often raises foreign policy concerns that are primarily the province for the Executive Branch." Brief for the United States as Amicus Curiae Supporting Appellants, *Matsushita*, 1985 WL 669663, at *14-15; *see also Matsushita* Amicus Br. at *19.

The burden of proof for the FSC defense is on defendants. *Matsushita* Amicus Br. at 22; *cf. Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d Cir. 2000) (addressing act of state doctrine).

According to the Justice Department, for the FSC defense to apply, the defendant must face "the imposition of penal or other severe sanctions" for refusing to comply with the foreign government's command. Antitrust Guidelines § 3.32. The Justice Department has also recognized the FSC defense to be applicable where refusal to comply with the command of a foreign sovereign would be futile.[27]

"Of course, the [FSC] defense is not available for conduct going beyond what the foreign sovereign compelled." Weber Waller, Antitrust and American Business Abroad § 8:23 n.6; *see also Mannington Mills*, 595 F.2d at 1293 ("One asserting the defense must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct"); *cf. United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231, 259 (N.M. 1980) (explaining that even if defendant was compelled to participate in cartel by the Canadian government, the act of state doctrine would not bar inquiry into whether defendant "went beyond the scope of the cartel as the Canadian Government defined it").

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27. In *Matsushita*, a predatory pricing case that went up to the Supreme Court, the Japanese government represented that if the defendants had failed to follow the government's direction to enter into minimum price agreements and a customer division regulation, the government would have invoked its power to unilaterally impose those export restrictions. Brief for the Government of Japan as Amicus Curiae in Support of Petitioners, *Matsushita*, 1985 WL 669665, at 13a-14a. The United States' amicus brief found this sufficient to establish the FSC defense. *Matsushita* Brief at *24-25. The Supreme Court, however, did not reach the FSC defense. 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

B. Animal Science and the FSC Defense

In *Animal Science*, the court addressed the FSC defense, concluding that the only pertinent question in determining the applicability of the FSC defense was whether the defendants were compelled to abide by the minimum prices set through the relevant Chamber.[28] 702 F. Supp. 2d 320, *vacated on other grounds*, 654 F.3d 462, 2011 U.S. App. LEXIS 17046, 2011 WL 3606995 (3d Cir. Aug. 17, 2011). The court considered the question of "how the minimum prices came about" to be irrelevant. *Id.* at 438 & n. 119. According to the court, the plaintiffs were challenging the defendants' decision to follow the minimum price and the defendants' "coining" of that minimum price was "a ministerial task entirely different from the challenged conduct." *Id.* at 438. The court also reasoned that a person (be they a legislator, agency official or company in a regulated industry) who participates in "coining" a law or regulation is not exempted from the compulsion of the resulting law or regulation. *Id.* at 424-25, 438.

I disagree with the approach taken in *Animal Science*. If the defendants in *Animal Science* were not compelled

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28. The defendants in *Animal Science*, Chinese magnesite producers, were not governed by verification and chop. However, they were still subject to export quotas, which were set by the Ministry, and a minimum price. The court's compulsion analysis focused on the minimum price, which was determined through meetings of the producers convened by the relevant Chamber and then registered with, and enforced by, the Ministry. Selling below the minimum price could result in penalties, including fines, loss of quota allotment and revocation of export license.

to reach minimum price agreements in the first instance, the fact that such agreements were enforced would not appear sufficient to establish the FSC defense. It should be noted that, in a footnote, the court in *Animal Science* went on to explain that even if the question of "how the minimum price came about" was relevant, based on the Ministry's statements in the instant case, the defendants in *Animal Science* had a mandatory obligation to engage in deliberations about the minimum price and that "an attempt to filibuster would cause a substantial punishment." *Id.* at 438 n. 119. However, as explained below, I disagree with the Ministry's position. Furthermore, the court in *Animal Science* did not address whether, given the discretion that the defendants had to set the level of the price, prices set above the minimum level necessary to avoid anti-dumping suits and below-cost pricing would be beyond the scope of any potential compulsion.

III. The State Action Doctrine

Where a state enacts programs regulating domestic commerce, the state action doctrine provides antitrust immunity for the regulated private parties who participate in such programs. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 1726, 85 L. Ed. 2d 36 (1985). To qualify for immunity under the state action doctrine, the anticompetitive restraint must be "clearly articulated and affirmatively expressed as state policy" and "the State must actively supervise any private anticompetitive conduct." *Id.* at 1727. The state action defense applies to state policies that "permit, but do

not compel, anticompetitive conduct by regulated parties." *Id.* at 1728; *see also Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

Defendants argue that even if they fail to qualify for the FSC defense, the state action doctrine should be applied to regulatory programs enacted by foreign governments. One recent decision has rejected this argument. *In re Transpacific Passenger. Air Transp. Antitrust Litig.*, No. C 07-5634, 2011 U.S. Dist. LEXIS 49853, 2011 WL 1753738, at *16 (N.D. Cal. May 9, 2011). Also, in its amicus brief to the Supreme Court in *Matsushita*, the Solicitor General distinguished the FSC defense from the state action defense and suggested that the state action defense should not apply in the foreign context. *Matsushita* Amicus Br. at 20-22.

It is unnecessary to determine whether the state action doctrine should be available to defendants because they have not even attempted to establish the active supervision prong. After plaintiffs raised this issue in their opposition brief, defendants responded that, as matter of comity, they should not have to meet the strict requirements of the state action doctrine. As discussed previously, absent compulsion, dismissal on comity grounds is not warranted.[29]

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29. One commentator has suggested that a defendant exercising authority delegated by a foreign government should be entitled to an even broader defense than is available under the state action doctrine. Weber Waller, Antitrust and American Business Abroad § 8:20. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, a subsidiary of the defendant was delegated authority by the Canadian

IV. Act of State Doctrine

A. Overview

The act of state doctrine is a judge-made rule of federal common law. Antitrust Guidelines § 3.33. The "doctrine directs United States courts to refrain from deciding a case when the outcome turns upon the legality or illegality (whether as a matter of U.S., foreign, or international law) of official action by a foreign sovereign performed within its own territory." *Riggs Nat. Corp. & Subsidiaries v. C.I.R.*, 163 F.3d 1363, 1367, 333 U.S. App. D.C. 371 (D.C. Cir. 1999). Although the doctrine was originally based on considerations of international comity, more recent decisions have focused on the doctrine "as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400,

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government to act as the exclusive purchasing agent for the Canadian vanadium market. 370 U.S. 690, 706-07, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962). The subsidiary used that authority to exclude a seller, which competed with the defendant, from the Canadian market. In refusing to apply the act of state doctrine, the Supreme Court explained that the subsidiary's exclusion of the competing seller was neither compelled nor approved by the Canadian government. *Continental Ore* "leaves open the possibility that delegated conduct shown to have been consistent with the standards and purposes of the foreign regulatory program will not be treated as harshly as purely private conduct." Antitrust and American Business Abroad § 8:20. However, the Supreme Court and the Second Circuit have yet to recognize such a far-reaching defense and I decline to do so here.

110 S. Ct. 701, 107 L. Ed. 2d 816 (1990) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)). "The act of state doctrine is not some vague doctrine of abstention but a 'principle of decision binding on federal and state courts alike.'" *Id.* at 406 (quoting *Sabbatino*, 376 U.S. at 427). Defendants bear the burden of proof to justify application of the act of state doctrine. *Bigio*, 239 F.3d at 453.

The factual predicate for application of the act of state doctrine only exists where the suit "requires the Court to declare invalid, and thus ineffective as a rule of decision for the courts of this country, the official act of a foreign sovereign." *W.S. Kirkpatrick*, 493 U.S. at 405 (citation and internal marks omitted). Thus, "[a]ct of state issues only arise when a court must decide–that is, when the outcome of the case turns upon the effect of official action by a foreign sovereign." *Id.* at 406. However, even where the factual predicate for the act of state doctrine is met, courts, applying a balancing approach, can refuse to apply the doctrine if the policies underlying the doctrine do not justify its application. *Id.* at 409.

B. Act of State Doctrine and Compulsion

Defendants argue that the act of state doctrine is applicable to the instant case based on the following logic: because defendants' actions were compelled by the Ministry, defendants' acts are "effectively" the acts of the Ministry—thus, any challenge to defendants' conduct is, in essence, a challenge to official actions taken by the Ministry. Although this makes sense—assuming

defendants' conduct was compelled—it is not clear how proceeding under the act of state doctrine, as opposed to the related FSC defense, adds anything to defendants' case. There are, however, two other ways in which the act of state doctrine may be applicable to instant suit.

C. Inquiry into the Motivation of Foreign Governments and Officials

Defendants argue that the act of state doctrine does not require compulsion, citing the Antitrust Guidelines. Antitrust Guidelines § 3.33 ("[a]lthough in some cases the sovereign act in question may compel private behavior, such compulsion is not required by the doctrine"). This section of the Antitrust Guidelines suggests that the relevant agencies consider the act of state doctrine to be applicable to certain suits where a court would be required to inquire into the motivation of the foreign state for taking an action.[30]

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30. In asserting that the act of state doctrine does not require compulsion, the Antitrust Guidelines cite to *Timberlane*, 549 F.2d at 606-08. In *Timberlane*, the plaintiff alleged that, as part of a scheme to put the plaintiff out of business, the defendants filed suit in Honduran courts and foreclosed on security interests that they held on the plaintiffs' assets. Invoking the act of state doctrine, the defendants relied on an earlier decision that had applied the doctrine to bar a suit alleging that the defendants induced a foreign government to assert fraudulent claims over the scope of its territorial waters in order to interfere with the plaintiff's oil concession. *Timberlane*, 549 F.2d at 608 (discussing *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972)). These appear to be the type of non-compelled scenarios

The Second Circuit has held that the act-of-state doctrine bars inquiry into a foreign government's motivations for taking a specific action. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977) (dismissing suit that could not be resolved without determining that, but for defendants' actions, the Libyan government would not have seized and nationalized plaintiff's assets); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987) (citing *Hunt* and dismissing suit where defendants allegedly manipulated the Colombian government into implementing discriminatory cargo laws that injured plaintiff).

However, I believe that these decisions have been overruled by *W.S. Kirkpatrick*. *See* Antitrust and American Business Abroad § 8:11 ("The reasoning of [*Buttes*] and *Hunt* regarding the motivations of the foreign states has not survived [*W.S. Kirkpatrick*]."); *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (post-*W.S. Kirkpatrick* decision refusing to apply act of state doctrine where defendants allegedly agreed to make payments in exchange for price controls on Venezuelan tobacco that injured domestic tobacco growers).[31]

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envisioned by the Antitrust Guidelines, which indicate that "Agencies may refrain from bringing an enforcement action based on the act of state doctrine" where the "restraint on competition arises directly from the act of a foreign sovereign, such as the grant of a license, award of a contract, expropriation of property, or the like." Antitrust Guidelines § 3.33.

31. Given *W.S. Kirkpatrick*, it is not clear why the Antitrust Guidelines take the position that inquiries into the motivations of

In any event, in the instant case, no inquiry into the motivation of the Ministry in promulgating the relevant governmental directives is necessary. This is because plaintiffs have not pursued the potential argument that the FSC defense is inapplicable because defendants procured those directives.[32] Rather than contending that *Hunt* and *O.N.E. Shipping* were overruled by *W.S. Kirkpatrick*, plaintiffs simply distinguish those decisions on the ground that they both involved situations where the foreign government took an action that harmed the plaintiff. Because plaintiffs argue that verification and chop did not involve any compulsion, they reason that it was defendants' voluntary actions, rather than the sovereign acts of the Chinese government, that harmed them.[33]

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a foreign state are still barred by the act of state doctrine. The explanation may be that, for purposes of making enforcement decisions, the Antitrust Guidelines take a more expansive view of the act-of-state doctrine than the one adopted by the Court in *W.S. Kirkpatrick*. Notably, in *W.S. Kirkpatrick*, the Justice Department, as an amicus, advocated such a position, which was ultimately rejected by the Court. 493 U.S. at 408-09.

32. Although plaintiffs do not pursue this argument, in their 56.1 statement and the facts section of their brief, plaintiffs contend that the verification and chop system "was adopted by agreement among [d]efendants," citing to the statement from the April 2001 Subcommittee meeting that "because the manufacturers have not agreed on the enforcement mechanisms of the verification and chop system, it remains a major question whether this price limit can be enforced effectively." This and other evidence in the record suggests that defendants and Chinese officials were co-equal players in the regime governing vitamin C, and indeed, it may be that defendants were the leaders, in designing that regime.

33. The act of state doctrine would not have prevented plaintiffs from arguing that the FSC defense should be inapplicable

Appendix C

D. Inquiry into Foreign Officials' Compliance with and Enforcement of Foreign Law

Courts have invoked the act of state doctrine to preclude inquiry "behind" sovereign acts. This can occur where a party contends that a sovereign act is in derogation of the sovereign's own laws. The doctrine has also been applied where a party seeks to establish that a foreign government has failed to comply with and enforce its own laws.

Defendants rely on *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), where the plaintiff, in an attempt to rebut an assertion of the FSC defense, sought to establish that an oral order given by a Venezuelan official was not binding and compulsive because, under Venezuelan law, the official had

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because defendants procured the alleged compulsion. The court in *Interamerican Refining Corp. v. Texaco Maracaibo. Inc.*, 307 F. Supp. 1291, 1297 (D. Del. 1970), suggested that the FSC defense should not be recognized in such circumstances. I am sympathetic to this view. Certainly, the fairness concerns behind the FSC defense would no longer be applicable where the compulsion was procured by the defendant. Moreover, where, as in the instant case, defendants enthusiastically embrace a legal regime that encourages, or even "compels," a lucrative cartel that is in their self-interest, any inquiry into the applicability of the FSC defense is artificial. In such circumstances, the presence or absence of compulsory measures is seemingly irrelevant, for they are never going to be needed. To borrow a metaphor used by Mao Tse-Tung, the concept of "coercion" in this context is a paper tiger. Ultimately, it is unnecessary to rely on the above points to resolve this motion because I conclude that the 2002 Regime did not involve any compulsion.

no authority to issue the order and such oral orders were not binding. Through the affidavit of a Venezuelan attorney, the plaintiff sought to establish this both, as a legal matter, and, somewhat confusingly, as a factual matter at trial, *id.* at 1301 ("[the plaintiff] urges that it be permitted to show at trial that the order was not binding because oral and without legal authority"). Although the court explained that "whether or not [the Venezuelan] official 'ordered' certain conduct is an evidentiary question," the court rejected plaintiff's arguments based on the act of state doctrine, which precluded the court from examining the validity of the order under Venezuelan law.[34] *Id.* The court added that whether the act was legal or "compulsive" under the laws of Venezuela is not a proper inquiry for either a court or a jury and that "[o]nce governmental action is shown, further examination is neither necessary nor proper. *Id.* Because plaintiffs here do not argue that the governmental directives establishing the 2002 Regime are invalid under Chinese law, *Interamerican* is largely irrelevant to the instant motion.

West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987), is arguably more relevant to the instant motion. In *West*, the Ninth Circuit held that the act of state doctrine bars inquiry into whether foreign officials are failing to

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34. The plaintiff in *Interamerican* argued that its evidence of Venezuelan law, as well as other facts, "refute[d] the existence of [the alleged] order." Pl.'s Br. in Opp. to Def.'s Motions for Summ. Judg., *Interamerican*, No. 2808 (May 28, 1969). However, the plaintiff addressed this argument in a single, brief, paragraph and made no effort to explicitly explain how its evidence of Venezuelan law should have been considered in making this factual determination.

enforce their own laws. In order to resolve a securities suit involving certificates of deposit issued by a Mexican bank, the court had to determine whether the Mexican banking regulatory scheme (which included supervision by the government, capital and reserve requirements, and other safeguards) "virtually guaranteed repayment in full." *Id.* at 827. The plaintiffs argued the regulatory regime only met this standard "on paper" because, in practice, Mexican officials neither complied with nor enforced these laws. *Id.* Invoking the act of state doctrine, the Ninth Circuit rejected this argument, holding that courts "may not examine the actual operations of the regulatory system to the extent that such inquiry would directly implicate the failure (whether willful or negligent) of officers of the foreign state to enforce their own laws." *Id.* at 828. The court went on to note that "[a]s a matter of comity, we presume that Mexican officials are acting in a manner consistent with the requirements of Mexican law."[35] *Id.*

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35. The viability of *West* after *W.S. Kirkpatrick* is questionable. Although *West's* rationale for invoking the act of state doctrine is not entirely clear, its primary justification appears to have been that a challenge to the effectiveness of Mexican officials would embarrass the Mexican government and "intrude upon [Mexico's] coequal status." *Id.* at 827-828. However, *W.S. Kirkpatrick* made clear that "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding [a case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." 493 U.S. at 409. The court in *West* also relied on *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406-07 (9th Cir. 1983). However, as noted earlier, "motivation" decisions such as *Clayco*, which invoked *Buttes* to bar inquiry into

ANALYSIS

To resolve defendants' motion for summary judgment, I must: (1) determine what deference, if any, should ultimately be accorded to the Ministry's interpretation of Chinese law; (2) determine what, if any, consideration should be given to the factual record, which defendants contend is irrelevant to the instant motion; (3) interpret Chinese law. These three inquiries are, to a certain degree, interrelated.

At the outset, I am compelled to note that the Chinese law and regulatory regime that defendants rely on is something of a departure from the concept of "law" as we know it in this country—that is, a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system. To give but one example, the regulatory system governing vitamin C not only relies on consensus-based decision making, but also accords defendants wide, and possibly unbounded, discretion in setting the price and output levels for vitamin C.

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whether bribes paid to a foreign government resulted in the plaintiff losing an oil concession, appear to no longer be viable after *W.S. Kirkpatrick*. Given the above concerns about *West*, I also question the continuing viability of the Second Circuit's broad dicta in *O.N.E. Shipping*, asserting that "[i]n essence, the act of state doctrine is a principle of law designed primarily to avoid judicial inquiry into *the acts and conduct of the officials of the foreign state*, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government." 830 F.2d at 452 (emphasis added).

In addition, defendants' own expert asserts that oral directives are an important component of Chinese regulatory law and admits that "Chinese governmental control is a quite different process from what takes place in other countries." Of course, foreign legal regimes that are markedly different from our own can still, in their own unique ways, compel a defendant's conduct. However, in some circumstances, asserting a claim of compulsion under a foreign regime that so differs from our own concept of law can be akin to trying to fit a round peg into a square hole. Close ties and cooperation between government and industry does necessarily equal compulsion, particularly in situations where compulsion appears unnecessary.

For the reasons explained below, I respectfully decline to defer to the Ministry' interpretation of Chinese law and conclude, based on what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the Subcommittee and the Chamber—that the 2002 Regime did not compel defendants' conduct. This interpretation is further supported by the factual record. In interpreting Chinese law, I find it appropriate to consider the factual record concerning how Chinese law was enforced and applied.[36] In addition, as explained

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36. I have concluded that it is appropriate to look to the factual record to help interpret the governmental directives at issue. There is also a strong argument that consideration of the factual record is necessary because any oral directives by officials of the Ministry and the Chamber appear to be an essential part of the Chinese law governing vitamin C. According to Professor Shen, "it is normal for [regulatory documents promulgated by the Ministry] to be expressed

below, to the extent that the factual record contains any disputed issues of fact that are relevant to the task of interpreting Chinese law, such disputes are for the Court to resolve.

I. Deference to the Ministry's Statements

Except for the Ministry's explanation of the relationship between the Ministry and the Chamber,[37] I respectfully

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at a level of generality that then must be applied and implemented in specific contexts." This application and implementation "frequently" occurs through "oral directions, even including telephone calls." I also note that defendants themselves suggest that coordination was only required when the Chamber "direct[ed] the manufacturers to cooperate as to prices or output." If that were the case, an inquiry into what the representatives of the Chamber communicated to the defendants would be necessary to resolve the FSC defense. Of course, the above discussion assumes that the act of the state doctrine would be equally applicable to both oral directives and written law, a conclusion as to which I harbor some doubt.

37. According to the Ministry, "specific chambers of commerce, when authorized by the Ministry to regulate, act in the name, with the authority, and under the active supervision, of the Ministry." In sum, the Ministry asserts that the Chamber is "the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China," including vitamin C.

> Plaintiffs challenge the Ministry's position arguing that: (1) the 1991 Measures granting the Ministry supervisory authority over the Chamber were abolished and, under subsequent laws, the Chamber was treated no differently than other social organizations in China; and (2) representations made by other Chambers indicate that the Chamber is a non-governmental organization that is independent of the government.

decline to defer to the Ministry's interpretation of Chinese law. As explained below, the Ministry fails to address critical provisions of the 2002 Regime that, on their face, undermine its interpretation of Chinese law. "[T]he support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas" "[w]here a choice between two interpretations of ambiguous foreign law rests finely balanced." *Karaha Bodas*, 313 F.3d at 90. However, that is not the case here, particularly given the Ministry's failure to address key provisions of the 2002 Regime.[38]

I note that three significant flaws in the Ministry's 2009 Statement render it particularly undeserving of deference. First, in contrast to the Ministry's amicus brief, which at least attempted to explain the regulatory system governing vitamin C exports by citing to, and discussing, specific governmental directives and Chamber documents,

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Neither of these arguments is persuasive. At the very least, the Chamber was delegated authority, under the 2002 Regime, to grant and deny chops, which, in some circumstances, were required for export. In addition, the 1991 Measures and 1994 Notice (both of which were still in force during the relevant period), as well as the 2003 Chamber Charter, all establish that the Ministry held a special supervisory role over the Chamber. However, none of these points, standing alone, establish compulsion or require dismissal under the act of state doctrine.

38. The United States' submissions in the WTO proceeding relied on the amicus brief and statements submitted by the Ministry in the instant litigation. The Executive Branch, however, has not communicated to this Court that the Ministry's statements should be accorded heightened deference based on the Executive Branch's reliance on those statements in the WTO proceeding.

the 2009 Statement does not cite to any of those sources to support its broad assertions about the regulatory system governing vitamin C exports. This omission is compounded by the 2009 Statement's declaration that self-discipline regulation required vitamin C exporters "to coordinate among themselves on export price and production volume *in compliance with China's relevant rules and regulations.*" Of course, this simply begs the question of what did the relevant rules and regulations require—an issue that the 2009 Statement conspicuously avoids by not citing to any governmental directives or Chamber documents.[39] Second, as discussed *infra*, the 2009 Statement contains numerous ambiguous terms and phrases, particularly with regard to the penalties under self-discipline. Third, although there are clearly some differences between the 1997 Regime and 2002 Regime, the 2009 Statement makes no attempt to distinguish between the two regimes. The 2009 Statement does not read like a frank and straightforward explanation of Chinese law. Rather, it reads like a carefully crafted and phrased litigation position.

China's representation to the WTO that it gave up "export administration . . . of vitamin C" as of January 1, 2002 is further reason not to defer to the Ministry's position. Although many of the public statements cited by the Stern Report are, as the Ministry asserts, simply

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39. Professor Shen's attempt to define "self-discipline" is also circular and unhelpful. He asserts that "'[s]elf-discipline' means that all industries shall maintain import and export order in accordance with laws, regulations and rules and shall not conduct operation in violation of regulations regardless of national interest."

general descriptions of the current status of China's economy and China's transition toward a market economy, the Ministry makes no attempt to explain China's representations that it gave up export administration of vitamin C, which appear to contradict the Ministry's position in the instant litigation.

Moreover, although not dispositive on the question of the appropriate deference to be afforded to statements by foreign governments, when the alleged compulsion is in the defendants' own self-interest, a more careful scrutiny of a foreign government's statement is warranted. Similarly, in interpreting Chinese law, I cannot ignore the obvious fact that a compulsory regime is unlikely to be present where the defendants' economic interest is in accordance with the allegedly compelled conduct.

Finally, the factual record contradicts the Ministry's position.[40] In sum, all of the points above suggest that the Ministry's assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny

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40. As defendants correctly point out, some of the documentary evidence in the record is consistent with the Ministry's interpretation of Chinese law and explanation of compulsion. This includes evidence documenting that: (1) defendants voted on proposals and reached agreements through consensus; (2) such agreements were reached at meetings with the Chamber and "under the coordination of [the Chamber],"; and (3) defendants failed to reach consensus on certain occasions. However, not only is the above evidence also consistent with an absence of compulsion, but, as explained *infra*, there are other facts in the record, such as those surrounding Weisheng's violation of the shutdown agreement in 2004, that directly contradict the Ministry's position.

rather than a complete and straightforward explanation of Chinese law during the relevant time period in question. Although the Ministry encouraged defendants' cartel and now fervently desires that defendants be dismissed from this suit, those policy preferences do not establish that Chinese law "required" defendants to follow their anti-competitive predilections.

Like the Ministry, Professor Shen also fails to address important provisions of the 2002 Regime that contradict his interpretation of Chinese law. I therefore cannot accept his conclusion that "the implementation of the verification and chop mechanism . . . did not in any way change the level of control that the government maintained over the vitamin C industry." Not only does Professor Shen fail to address key provisions of the 2002 Regime, he maintains that "[t]he mechanism through which [China's policy requiring coordination] was to be accomplished was not the key point," which suggests that he views the details of the 2002 Regime as essentially irrelevant.

II. Interpretation of Chinese Law Based on the Traditional Sources of Foreign Law

A. Applicability of the 1997 Regime to Defendants' November 2001 Agreement

Once the 2002 PVC Notice took effect on May 1, 2001, all of defendants' subsequent conduct (including their continuing compliance with the agreement reached in November 2001) was governed by the 2002 Regime. Moreover, although the 2002 PVC Notice did not formally

take effect until May 1, 2002, I will assume that the 2002 PVC Notice governed defendants' conduct in the interim period between the abolishment of the 1997 Regime on March 21, 2002 and the formal institution of the 2002 PVC Notice.

There is, however, a question as to what directives governed the remainder of defendants' conduct regarding the agreement they reached in November 2001. That agreement concerned the coordinated export price that was to take effect on January 1, 2002 and total export volumes for 2002. The 1997 Notice was still formally in effect from January 1, 2002 through March 21, 2002. However, China represented to the WTO that as of January 1, 2002, it gave up "export administration . . . of vitamin C." This representation coincides with the repeal, on January 1, 2002, of the 1992 Interim Regulations, which appear to have established the foundation of the export licensing and quota regime in place at the time. Notably, like the 1997 Regime, the 1992 Interim Regulations also subjected vitamin C to export licensing and quotas. Given the above, I conclude that the 1997 Regime did not govern defendants' compliance with the November 2001 agreement. Thus, the 1997 Regime is irrelevant to the instant motion, except to give context to the 2002 Regime.

B. Suspension Provision

The Suspension Provision in the 2002 PVC Notice provides that "[g]iven the drastically changing international market, the customs and chambers may suspend export price review for certain products with the

approvals of the general members' meetings of the sub-chamber (coordination group) and filing with [Customs]." Neither the Ministry nor Professor Shen address this provision, which I interpret as granting defendants the unilateral authority to suspend verification and chop.[41]

The Suspension Provision is open to two potential interpretations. Under either interpretation, it is clear that the Chamber and Customs could not suspend verification and chop without the approval of the members of the Subcommittee (*i.e.*, the defendants). However, this provision is ambiguous as to whether defendants had the unilateral power to suspend verification and chop. The term "may" could be read to indicate that even if the members agreed to suspend verification and chop, the Chambers and Customs could, but were not required to, suspend it. The most plausible interpretation of this provision is that the Subcommittee had the unilateral power to suspend verification and chop. It would make little sense if the Subcommittee was granted the power to veto a decision of the Chamber and Customs regarding the suspension of verification and chop, but did not have the unilateral power to decide whether to suspend verification and chop in the first instance.

Although the 2003 Announcement does not contain a similar explicit suspension provision, I construe the 2003 Announcement as granting defendants the same power under the 2003 Announcement. Nothing in the record

41. There is no evidence that the 1998 Opinions, the text of which is not in the record, contained a similar suspension provision.

indicates that the 2003 Announcement's extension of verification and chop was intended to alter the substance of the regime in any way. In fact, both the Ministry and Professor Shen appear to view the 2002 PVC Notice and the 2003 Announcement as essentially interchangeable.

Moreover, even if the absence of an explicit suspension provision in the 2003 Announcement were material, under the 2003 Announcement defendants had the power to effectively suspend verification and chop simply by not reaching any agreements in the first instance. Although the 2003 Procedure's requirement that the Chambers "verify the submissions based on the industry agreements [and relevant regulations]" indicates that the contracts must comply with the relevant industry agreements, neither the 2003 Announcement nor the 2003 Procedures explicitly direct defendants to reach any agreements in the first instance. During any period in which no industry agreements were in effect, it can be assumed that either a chop would be granted to any contract submitted to the Chamber irrespective of the contract price or that the requirement for chops would simply be abandoned.

The interpretation above is, standing alone, sufficient reason to deny summary judgment.[42] Moreover, this interpretation renders moot any potential act of state concerns because, under this interpretation, inquiries into the enforcement of the 2002 Regime and defendants' role in promulgating the 2002 Regime are unnecessary to resolve the instant motion.

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42. Given this interpretation, it is not clear what would be left for the jury to determine at trial, particularly in regards to the pre-filing period.

Although I could end my analysis here, there are further reasons why denial of summary judgment is warranted. For one thing, as certain points below illustrate, even if Chinese law did involve some compulsion, summary judgment would still be denied because Chinese law assuredly did not compel all of defendant's illegal conduct.

C. Applicability of Verification and Chop to Industry-Agreed Output Restrictions

I conclude that, as a matter of Chinese law, in order to receive a chop under the 2002 PVC Notice and 2003 Announcement, an export contract was only required to comply with the industry-agreed minimum price ("Price Interpretation"). Compliance with industry-agreed output restrictions was not required to receive a chop. Because verification and chop did not require compliance with industry agreements regarding output, it can also be assumed that the 2002 Regime did not compel such agreements in the first instance.

Nothing on the face of the governmental directives indicates that compliance with output restrictions was required to receive a chop. The 2002 PVC Notice explicitly focuses on price and the 2003 Announcement is ambiguous regarding the applicability of verification and chop to output restrictions.

The 2002 PVC Notice explicitly states that "the relevant chambers" were required to submit to Customs "information on industry-wide negotiated prices" and

repeatedly refers to "price review." By contrast, the 2002 PVC Notice makes no mention of industry-agreed output restrictions.[43] Moreover, if all agreements, including agreements regarding output restrictions, were to be enforced through verification and chop, it is not clear why the 2002 Charter includes a provision for "security deposit[s]" to ensure compliance with industry agreements. Furthermore, because the apparent purpose of the 2002 Regime was to avoid dumping suits and below cost-pricing, *see* discussion *infra*, it is not surprising that the 2002 Regime was limited to compliance with a minimum price.

Although the term "industry agreements" in the 2003 Procedures is broad enough to also include agreements on output restrictions, this ambiguity does not favor either potential interpretation. In addition, as noted earlier, nothing in the record indicates that the substance of verification and chop differed between the 2002 PVC Notice and the 2003 Announcement. The only provision in the 2003 Announcement that could be read to suggest that compliance with output restrictions was also required to receive chops is the 2003 Procedures' direction that chops be affixed on the contract "where the prices and quantities are specified." However, in light of the plain language of the 2002 PVC Notice, this ambiguous provision is insufficient to establish that verification and chop required compliance with output restrictions.

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43. Similarly, the 1998 Opinions cited by Professor Shen only appear to have required compliance with a minimum price.

Moreover, some of the Ministry's own statements support the Price Interpretation. According to the Ministry, under the 2002 PVC Notice, "[i]f the [contract] price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed . . . a 'chop.'" The Ministry similarly has acknowledged that the "basis" of the verification and chop system "was a process of 'industry-wide negotiated prices.'"

Neither the Ministry nor Professor Shen offers any compelling explanation undermining the Price Interpretation. First, I recognize that, in addition to stating that the Chamber would affix a chop "[i]f the [contract] price was at or above the minimum acceptable price set by coordination through the Chamber," the Ministry's amicus brief also states that, under the 2002 PVC Notice, the Chamber "'verified,' i.e., approved, the contract price and volume." The Ministry, however, provides no citation to support this assertion. Perhaps the Ministry is referring to the 2003 Procedures' requirement that chops be affixed on the contract "where the prices and quantities are specified." Yet, even if the Ministry had explicitly cited to the 2003 Procedures as support, that ambiguous provision is insufficient in light of the other evidence in the record outlined above.

Second, the 2009 Statement, which does not discuss any of the specific governmental directives, fails to address any of the issues raised above. Third, although Professor Shen suggests that the 2003 Procedures require compliance with both a minimum price and output restrictions in order to receive a chop, Professor

Shen never addresses the limited language of the 2002 PVC Notice that refers only to "industry-wide negotiated prices" and "price review." Moreover, as discussed *infra*, both Professor Shen and the Ministry completely ignore the 2002 Charter

D. Potential Penalties for Non-Compliance with Self-Discipline

In arguing that the FSC defense is applicable, the Ministry's amicus brief, citing to the 1997 Notice and 1997 Charter, relies, *inter alia*, on the fact that defendants: (1) were required to be members of the Subcommittee; and (2) would not have been able to export vitamin C if they failed to participate in "price-setting" activities. The Ministry, however, does not explain how Subcommittee membership was required under the 2002 Regime and 2002 Charter or how defendants' export right would be affected if they failed to participate in price-setting and output-setting activities under the 2002 Regime. Thus, even assuming that, under "self-discipline," defendants were supposed to "consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies," there was no penalty for failing to do so.

Preliminarily, I note that the absence of potential penalties or other mechanisms to compel defendants to reach price and output agreements is not surprising. As I mentioned earlier, there is no need to compel defendants

to do what makes them the most money.[44] It would actually be somewhat surprising to see a compulsory regime where the defendants' interests and the government's goals are aligned. Although the FSC defense would presumably still be applicable in such circumstances provided that a compulsory framework were, in fact, present, as a matter of common sense, such a regime is simply much less likely when the alleged compulsion is in the defendants' economic self-interest. *Cf.* Mitsuo Matshushita & Lawrence Repeta, Restricting the Supply of Japanese Automobiles, Sovereign Compulsion or Sovereign Collusion?, 14 Case W. Res. J. Int'l L. 47, 63 (1982) ("[T]he defendant's decision to act in a manner contrary to its monetary interests should be accorded great weight in determination whether that act was compelled.").

Turning to the instant record, certain governmental directives and Chamber documents state, on their face, that membership was no longer required under the 2002 Regime. The 2003 Procedures provide that "[f]or V&C Applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters." Similarly, the May 2002 Agreement

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44. Although it may have been unnecessary to compel defendants to reach price and output restriction agreements, a government-backed mechanism for ensuring compliance with those agreements would not be superfluous. Such an enforcement mechanism would attempt to counteract each defendant's individual incentive to cheat, which is a problem in almost any cartel. However, the presence of a compulsory enforcement mechanism would not establish that defendants' agreements were compelled in the first instance.

indicates that "[a] company, without being a member of the VC Chapter, can export VC (but the export quantity needs to be confirmed by other companies)." Moreover, none of the governmental directives and Chamber documents requiring membership remained in force under the 2002 Regime. The 1997 Notice was abolished and the 1997 Charter was replaced by the 2002 Charter, which describes the Subcommittee as a "a self-disciplinary industry organization jointly established on a *voluntary basis* by those Chamber of Commerce members which conduct import and export of vitamin C." (Emphasis added). In addition, the 2002 Charter does not include the provision in the 1997 Charter providing that "[t]he Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member."

The Ministry ignores the above provisions, which, on their face, contradict the Ministry's position and the Ministry's argument as to why the FSC defense is applicable.

The Ministry's submissions only briefly address the specific governmental directives underlying the 2002 Regime. In discussing the applicability of the FSC defense, the amicus brief's only reference to the 2002 Regime is in relationship to the enforcement of industry agreements. Similarly, the amicus brief's discussion of the 2002 Regime indicates that the 2002 Regime "changed the way in which *compliance* with the Chamber's 'coordination' was *confirmed* by abolishing [export licenses] and establishing [verification and chop]." (Emphasis added).

The Ministry does not address the fact that membership in the Subcommittee was no longer required and never discusses the 2002 Charter.[45] The 2009 Statement, which does not cite to any specific governmental directives, does not address these issues. Although Professor Shen asserts that membership was required under the 2002 Regime, he does not provide any citation to support that proposition and never addresses the contrary provisions in the governmental directives and Chamber documents. Similar to the Ministry's amicus brief, Professor Shen cites only to the 1997 Charter and never discusses the 2002 Charter.

Given the above, it is clear that even if a company's membership in the Subcommittee was revoked (or the company was never a member), that company could still export vitamin C.

Neither the Ministry nor defendants make any effort to explain how defendants' participation in price-setting and output-setting is compelled given that membership in the Subcommittee is no longer required. Although the 2009 Statement conclusorily asserts that persons engaged

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45. The Ministry's amicus brief was less than straightforward in its presentation of the 1997 Charter. The amicus brief did not mention the 2002 Charter and implied that the 1997 Charter was still controlling under the 2002 Regime. Notably, Judge Trager's decision appears to have assumed that the 1997 Charter was still operative throughout the relevant period. At oral argument on the motion to dismiss, the Ministry's counsel conceded that the "whole regulatory regime" under the 1997 Notice was superseded by the 2002 PVC Notice, but never mentioned the 2002 Charter.

in self-discipline are "well aware that they are subject to penalties" for "noncompliance with self-discipline," including "forfeiting their export right," the Ministry never explains: (1) why such persons are "well aware" of this fact; (2) what "forfeiting their export right" means in the context of the 2002 Regime; (3) how a forfeiture of export rights would be accomplished under the 2002 Regime; or (4) what the other potential penalties are.[46] The 2009 Statement also indicates that the Chamber was delegated "necessary enforcement measures" and that the Chamber had the power to "penalize," but the Ministry never identifies those "enforcement measures" or explains the Chamber's power to "penalize" under the 2002 Regime. Similarly, Professor Shen also maintains, without any explanation, that under the 2002 Regime, "[d]efendants' right to export will be forfeited if they refuse to participate in . . . coordination."[47] All of the above

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46. On its face, the 2002 Regime would only appear to deny a defendant its "right" to export if the defendant submitted a contract that failed to abide by the relevant industry agreements and was, thus, ineligible to receive a chop. However, nothing in the governmental directives indicates that chops were to be denied if defendants failed to reach agreements in the first instance.

47. At one point, Professor Shen suggests that compulsion arises from the fact that regulated companies "still have significant state ownership, the national and regional governments play an ongoing role, and top managers and executives generally owe their business positions to political appointment." However, defendants do not rely on this specific assertion and the Ministry does not advance a similar argument. Moreover, not only do I doubt, as a general matter, that this would be sufficient to trigger the FSC defense, but Professor Shen's sweeping assertion is clearly insufficient to establish that these specific defendants faced the possibility of coercion through

assertions are insufficient to establish the FSC defense. *See* Antitrust Guidelines § 3.32 (explaining that the FSC defense requires "penal or other severe sanctions" and that the Agencies will regard a foreign government's statement regarding compulsion to be conclusive if "that representation contains sufficient detail to enable the Agencies to see precisely how the compulsion would be accomplished under local law").

The only provision in the 2002 Regime that could potentially establish compulsion is the 2003 Procedures' "same treatment" provision, which states that "[f]or V&C Applications made by non-member exporters, the Chambers shall give them the *same treatment* as to member exporters." (Emphasis added). This provision suggests that although non-members could export under the 2002 Regime, non-members may have still been required to abide by the minimum price (and possibly also the output restrictions) set by the Subcommittee. Moreover, non-members would not appear to have any input into the restrictions that they would be required to follow—no defendant would want the amount of vitamin C it could export to be determined, unilaterally, by its competitors.

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these informal channels. Not only would this require a fact-intensive inquiry, but the factual record indicates that the type of compulsion suggested by Professor Shen was utterly absent here. As discussed *infra*, with regard to Weisheng's breach of a June 2004 shutdown agreement, there is no documentary evidence suggesting even the possibility that the informal levers of control noted by Professor Shen would be employed.

However, neither the Ministry nor Professor Shen nor defendants rely on the "same treatment" provision to establish compulsion. In any event, the above concerns notwithstanding, this provision is insufficient to establish compulsion.

First, non-members did not have to abide by output restrictions imposed by the Subcommittee. As discussed earlier, the 2002 Regime only requires compliance with the minimum price in order to receive a chop. As such, the "same treatment" provision would not have compelled defendants to reach agreements regarding output restrictions. In addition, although the May 2002 Agreement states that the "export quantity [of non-members] needs to be confirmed by other companies," this provision was never incorporated into the final 2002 Charter.

Second, even if non-members were required to abide by both price and output restrictions imposed by the Subcommittee, the absence of a membership requirement still leaves open the question of what would happen if all the members simply resigned from the Subcommittee. If this occurred, the non-members could still export and there would be no price or output restrictions that they would be required to follow. The only way the FSC defense would still be applicable in such circumstances is if I were to simply assume that the Ministry would directly impose restrictions that the non-members would be required to follow. However, the notion that the threat of the Ministry's direct intervention was hanging over the 2002 Regime appears to conflict with China's representations

to the WTO that it gave up "export administration . . . of vitamin C." Moreover, neither defendants nor the Ministry focus their compulsion argument on the possibility of the Ministry intervening and directly imposing price and output restrictions. Instead, the Ministry and defendants focus on the Chamber's power to penalize.

Given the above, I conclude that none of the provisions in the 2002 Regime, including the "same treatment" clause, would compel defendants to reach agreements in the first instance.

E. Relevance of the WTO Proceeding and the 1996 Interim Regulations

In the WTO Proceeding, the WTO panel concluded that China imposed minimum export price requirements on all of the raw materials at issue. Those raw materials were under the auspices of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters ("CCCMC"). The WTO panel found that the CCCMC's charter "authorized" and "directed the CCCMC to set and coordinate export prices" for those raw materials and that the resulting minimum prices were enforced through two governmental directives: (1) a licensing provision that is irrelevant to the instant suit; and (2) the 1996 Interim Regulations, which "imposed penalties on exporters that fail to set prices in accordance with the coordinated export prices."[48] WTO Panel Report

48. Although the complainants in the WTO Proceeding also argued that verification and chop was used to enforce the minimum price for one of the raw materials at issue, the WTO panel declined

¶¶ 7.1026, 7.1063. The WTO panel concluded that these provisions "amount[] to a requirement to coordinate export prices for the raw materials at issue." *Id.* ¶ 7.1064. The WTO panel also determined that "actions undertaken by the CCCMC with respect to minimum export price requirements . . . are attributable to China." *Id.* ¶ 7.1096.

The WTO panel's conclusions do not alter my interpretation of Chinese law. Notably, none of the parties in the WTO Proceeding ever argued that the measures in dispute did not impose a minimum price. Rather, China, the only party that had an incentive to take such a position, argued that: (1) all of the measures at issue relevant to a minimum price requirement were repealed prior to the panel's establishment on December 21, 2009; and (2) even if it did impose minimum prices, that would not constitute a violation for the purposes of the WTO.

In addition, the WTO panel did not discuss whether any of the CCCMC documents that it cited included provisions stating that membership in the CCCMC or its product-specific subcommittees were voluntary and that companies could export without holding such membership. As explained earlier, those provisions in the governmental directives and Chamber documents at issue here are critical to the question of whether defendants' agreements were compelled in the first instance.

Also, although the 1996 Interim Regulations appear to have been in effect during both the 1997 Regime and

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to address verification and chop because its repeal in May 2008 put it beyond the scope of the WTO panel's inquiry. WTO Panel Report ¶ 7.1054.

the 2002 Regime, neither the Ministry nor Professor Shen rely on those regulations to establish compulsion.[49] Professor Shen's report never even mentions the 1996 Interim Regulations.[50] In its amicus brief, the Ministry cites to the 1996 Interim Regulations merely as background in attempting to explain the goals of the 1997 Regime. In fact, the Ministry's counsel asserted at oral argument that there was no compulsion under the 1996 Interim Regulations: "[The 1997 Notice] is what establishes the license. So what you have in [the 1996 Interim Regulations] is the beginning of a, 'you shall,' but there is no mechanism yet. There is no hammer. There is no compulsion yet really."

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49. The complainants in the WTO Proceeding also relied on the Ministry's 2009 statement discussing self-discipline as well as two CCCMC "coordination measures," which are irrelevant to the instant suit. The WTO panel did not base its decision on these additional documents, finding them outside of "the Panel's terms of reference." WTO Panel Report ¶ 7.1028. The panel, however, still considered these documents in "assessing the operation of China's alleged [minimum price] requirement" and interpreting the 1996 Interim Regulations. *Id.* ¶ 7.1032. According to the panel, the 2009 Statement "reveal[s] that . . . parties would be subject to penalties for failure to participate in price coordination." *Id.* ¶ 7.1035. The panel, however, did not address the various deficiencies in the 2009 Statement that I identified earlier.

50. The fact that Professor Shen does not rely on the 1996 Interim Regulations is particularly noteworthy given that he wrote an article entitled "A Rational Read of the '(Interim) Provisions of the Investigation and Punishment of Improper Low-price Export Conduct,'" which appears to be about the 1996 Interim Regulations.

Furthermore, because the 1996 Interim Regulations cover all export products and the 2002 PVC Notice and 2003 Announcement address a limited number of specific products, one can assume in the event of any conflict the more specific directives would govern. For example, if defendants invoked the Suspension Provision in the 2002 PVC Notice, it is doubtful that they would have still been subject to potential penalties under the 1996 Interim Regulations. Moreover, China's assertion to the WTO panel that it ceased enforcing the 1996 Interim Regulations at the same time that it repealed verification and chop indicates that these directives should all be interpreted in light of each other.

Even if I were to conclude that the 1996 Interim Regulations involved compulsion and required defendants to set, and abide by, a minimum price, summary judgment would still be denied. The 1996 Interim Regulations only concern a minimum price and are irrelevant to the defendants' agreements regarding output restrictions. Moreover, as discussed below, the 1996 Interim Regulations only address concerns of below-cost pricing and anti-dumping.

F. Any Potential Compulsion was Limited to Avoiding Anti-dumping and Below-Cost Pricing

Even assuming that the 2002 Regime and the 1996 Interim Regulations provided potential sanctions and required defendants to agree on and abide by a minimum price (and possibly also output restrictions), I am not

convinced that the Chamber or the Ministry would have intervened through compulsory measures if defendants, in exercising their discretion, had simply set the minimum price and output levels at a point that would have avoided anti-dumping suits and below-cost pricing. Setting prices above that level exceeded the scope of any compulsion and, therefore, would not be immunized by the FSC defense.

On their face, the relevant directives do not indicate that defendants were required to set prices above a level that would have avoided anti-dumping suits and below-cost pricing. The 1996 Interim Regulations explicitly discuss below-cost pricing and appear to have been intended to avoid anti-dumping suits. Moreover, the directives underlying the 2002 Regime are vague regarding objectives other than avoiding dumping suits.

In addition, the "self-destructive competition" that the Ministry and Professor Shen claim concerned the government also appears to refer to below-cost pricing and avoiding anti-dumping. The 1998 Opinions cited by Professor Shen addressed below-cost pricing by instituting prices for certain domestic products based on average costs in the industry. Similarly, a law review article cited in Professor Shen's discussion of self-discipline indicates that the notion of "vicious competition" in the export context also refers to below-cost pricing. In discussing China's Anti-Monopoly Law, which directs trade associations to "strengthen the self-discipline of industries . . . [and] protect[] the order of market competition," the article explains that:

Appendix C

> In the legislators' eyes, there are two kinds of competition: the good and the bad. 'Good competition' refers to competing on quality and variety of product/services; *'bad competition' ('vicious competition') refers to below-cost pricing. The legislators believe the latter type is a race to the bottom and harms Chinese enterprises, especially those in the business of exporting raw materials*; and they further believe trade associations ought to promote 'self-discipline' among competitors and avoid such price wars.

Yong Huan, Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law, 75 Antitrust L.J. 117, 129-30 (2008-2009) (emphasis added). In addition, before the WTO panel, China asserted that "it designated [the Ministry] to coordinate export prices [for the raw materials at issue] to minimize the possibility of injurious dumping of Chinese exports by individual exporters." Panel Report ¶ 7.998.

Finally, neither the Ministry nor Professor Shen explicitly state that the Chamber or the Ministry would have intervened if defendants had set restrictions at the minimum levels necessary to avoid anti-dumping suits and below-cost pricing. In fact, the Ministry's counsel represented that, although the Ministry was concerned with dumping and wanted the companies to achieve "sufficient profit margins" in order to ensure the "stable development of the industry" and "full employment," the relevant profit margins were determined by the companies

themselves and the Ministry "really didn't care" what those margins were.

III. The Factual Record and Interpreting Chinese Law

A. Legal Standard

Under Rule 44.1, courts have substantial discretion to consider different types of evidence in determining foreign law. Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."). Although courts often rely on sources such as expert testimony and treatises in determining foreign law, Rule 44.1 does not limit courts to such evidence. *See United States v. First National Bank of Chicago*, 699 F.2d 341, 344 (7th Cir. 1983) (holding that there was "no doubt" that it was appropriate for district court to consider, *inter alia*, affidavit of bank manager in determining that Greek statute at issue was in effect during the relevant period and applied to foreign banks). In one recent decision, a court, in interpreting an ambiguous Brazilian regulation, relied on the fact that the plaintiff "offered no evidence that . . . Brazilian authorities ever prosecuted, or expressed an intent to prosecute, civilly or criminally, any person or institution for the conduct [the plaintiff asserted] was illegal in Brazil."[51] *Gusmao v. GMT Group,*

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51. Even if *West* were still good law and barred inquiry into whether foreign officials failed to enforce their own laws, *West* would not prevent consideration of the type of evidence considered in *Gusamo*. A court can presume that foreign officials were acting in a

Inc., No. 06-cv-5113, 2009 U.S. Dist. LEXIS 37092, 2009 WL 1174741, at *23 (S.D.N.Y. May 1, 2009).

A difficult question, however, arises when this type of evidence involves disputed facts. This was not an issue in *Gusamo* and no decisions appear to have addressed this question. Because courts are tasked with determining foreign law as a question of law,[52] courts, rather than juries, should resolve any disputed facts relevant to interpreting foreign law.

A determination of foreign law is, like choice of law analysis, a preliminary matter to be resolved by the court. Therefore, any disputed facts underlying that determination must also be resolved by the court. *See Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 742-43 (7th Cir. 2008) (holding, in the context of choice of law analysis, that district court should resolve the factual issue of whether defendant was a legitimate corporation operating out of

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manner consistent with the requirements of foreign law and construe ambiguous foreign law accordingly. In such circumstances, the type of evidence considered in *Gusamo* would not directly implicate a failure by foreign officials to enforce their own law.

52. Although no courts appear to have directly addressed the issue, determination of foreign law by judges does not appear to violate the Seventh Amendment. *See* Arthur R. Miller, Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 684 (1967) ("When the federal experience is examined against the backdrop of the early English and state court decisions, the irresistible conclusion is that there is no historic tradition of submitting foreign-law issues to the jury that is of sufficient clarity to warrant a present-day federal judge to hold that he is bound to do so as a constitutional matter.").

Illinois); *Cf.* Fed. R. Evid. 104 advisory committee's note, 1972 Proposed Rule ("To the extent that [inquiries into admissibility] are factual, the judge acts as a trier of fact."). Courts first determine the applicable law before cases can be given to the jury.[53]

Admittedly, in contrast to the Seventh Circuit, the Second Circuit held forty years ago that the jury, rather than the court, should make factual findings necessary to resolve choice of law questions. *See Marra v. Bushee*, 447 F.2d 1282 (2d Cir. 1971). However, that decision has been criticized, *see Chance v. E. I. Du Pont De Nemours & Co., Inc.*, 57 F.R.D. 165, 168-69 (E.D.N.Y. 1972), and I do not believe that the Second Circuit would extend it beyond its facts. As Judge Weisheng explained in *Chance*, because judges determine what the substantive law is, "[t]heory suggests that the facts predicate to a choice of law decision are generally for the judge rather than the jury." *Id.* at 168. That rationale is equally applicable to determinations of foreign law. Even assuming that the Second Circuit would continue to adhere to the holding of *Marra* in the choice of law context, for the reasons persuasively outlined by Judge

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53. The fact that, in the instant case, it may ultimately be unnecessary to instruct the jury regarding foreign law does not alter the analysis. As a general matter, the resolution of foreign law is a preliminary determination that must first be decided by the court before the case can go to trial before a jury. Notably, in the choice of law context, there can be situations where resolution of the critical facts underlying the choice of law analysis would be outcome determinative and, irrespective of how those facts are resolved, a grant of summary judgment would necessarily follow. Yet, the appropriate fact-finder for choice of law issues would surely not vary depending on the specifics of individual cases.

Weisheng in *Chance*, it is doubtful that the Second Circuit would extend the rationale of *Marra* beyond that case.

Finally, it cannot be overlooked that in this case I am not merely tasked with interpreting Chinese law, but also with determining the appropriate deference to be accorded to the statements of the Ministry. I do not think that the two can be separated as a practical matter, and the latter is clearly inappropriate for resolution by a jury. The resolution of factual disputes relevant to that inquiry is assuredly a function of the court and not the jury.

B. Preliminary Issues

1. Change in Chinese Law

I conclude, as a question of foreign law under Rule 44.1, that all evidence regarding post-filing conduct must, given the current record, be deemed irrelevant to the task of interpreting the Chinese law that was applicable during the pre-filing period. At a November 16, 2005 meeting, Qiao Haili referenced an instruction by "Premier Wen Jiabao" regarding "the enhancement of industrial self-regulation" as well as "an analysis" conducted by the "Secretary 2d Bureau under the State Council" that focused on vitamin C and "asked for resolving the legal status issue of the industrial self-regulation."[54] Because

54. Qiao Haili's statement is arguably hearsay. However, in making a determination of foreign law under Rule 44.1, I am not bound by the Rules of Evidence. Fed. R. Civ. P. 44.1; *see also Exxon Corp. and Affiliated Companies v. C.I.R.*, 63 T.C.M. (CCH) 2067 (T.C. 1992) (finding witness' testimony regarding telephone conversation

neither the Ministry nor defendants have offered this "instruction" or "analysis" into the record, I am unable to determine the specific impact this "instruction" or "analysis" had on Chinese law. However, I infer that that these changes were made in response to the instant suit — such an inference is particularly appropriate in light of the redactions surrounding these statements in the meeting minutes. Given this gap in the record, which defendants and the Ministry have failed to fill, I decline to rely on any post-filing conduct in interpreting the Chinese law that governed during the pre-filing period. In addition, the fact that, in November 2005, the Chinese government was attempting to "resolv[e] the legal status ... of the industrial self-regulation," a concept upon which defendants and the Ministry place great reliance, further suggests that Chinese law did not compel defendants' conduct, particularly in the pre-filing period.

In addition to the minutes of the November 2005 meeting, there is also other evidence in the record indicating that Chinese law fluctuated during the post-filing period. An e-mail authored by Wang Qi that discusses the November 2005 meeting indicates an evolving role for the Chamber. Also, the re-institution of export quotas in 2006 indicates a further potential change in Chinese law.

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in which Saudi Arabian Minister clarified scope of government price restriction to be "admissible under [tax court analogue to Rule 44.1] in ascertaining the scope of the restriction, for which its contents may be used in support of the truth thereof").

2. Miscellaneous Factual Findings

As an initial matter, I find it appropriate to address three statements in the pre-filing documentary record that could potentially be construed as affirmative evidence of compulsion. First, I find that the Ministry's statements in the fall of 2001 to the Chamber regarding the threatened anti-dumping suits do not indicate that defendants were compelled to reach agreement in November 2001 and to abide by that agreement. Second, I find that the summary of the December 2001 meeting from the Chamber's website does not constitute evidence of compulsion. Although this document may be susceptible to multiple interpretations, I interpret it to mean that the Chamber was announcing that defendants were able to reach, and implement, an agreement without the government's intervention because the government was no longer involved under the 2002 Regime and the Chamber was expressing its pleasure that defendants, freed from any constraints imposed by the 1997 regime (including the government imposed licenses and export quotas), were able to reach, and abide by, this agreement on their own. In making this finding, I note the absence of any testimony from the Chamber employee who drafted the summary at issue explaining its meaning. Third, I find that the statement by the representative of the Ministry at the April 2001 Subcommittee was not a compulsory order and, more importantly, even if it was, it is insufficient to indicate compulsion under the 2002 Regime given that the Ministry was clearly playing a different role under the 2002 regime. Moreover, even if this statement did indicate compulsion under the 2002 Regime, it does not speak to the question of whether

restrictions limited to combating below-cost pricing and anti-dumping would have been sufficient to satisfy the Ministry.

Although these factual findings and the additional findings below support my interpretation of Chinese law, I note that, based solely on the more traditional evidence of foreign law discussed earlier, I would reach the same conclusions even if I did not consider the factual record.[55]

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55. Plaintiffs cite to a decision from the European Court of First Instance addressing anti-dumping duties imposed by the European Union ("EU") against an exporter of Chinese glyphosate. Case T-498/04, *Zhejiang Xinan Chemical Industrial Group Co. Ltd v. Council of the European Union ("Zhejiang Xinan")*, 2009 ECJ EUR-Lex LEXIS 529 (June 17, 2009). Glyphosate is also subject to verification and chop under the 2002 PVC Notice and 2003 Announcement. In order to decide whether China should be treated as a market economy under the relevant dumping laws, the court in *Zhejiang Xinan* had to determine whether there was significant state interference in export prices. In arguing that no such interference existed, the Chinese exporter offered evidence showing, *inter alia*, that: (1) the "floor price" under verification and chop was merely a non-binding "guide" price established on the initiative of the exporters to combat anti-dumping concerns; and (2) after the guide price system was abandoned at a meeting in 2003, contracts were still subject to the "stamping procedure" by the relevant chamber so that it "could collect annual statistical information." The EU did not challenge the exporter's evidence on these points and based its case almost exclusively on the fact that, under verification and chop, the Chinese government granted the relevant chamber the power to refuse to grant a chop for contracts that were lower than the floor price. Although I do not rely on *Zhejiang Xinan* in interpreting Chinese law, I note that the position taken by the Chinese exporter and the evidence it apparently offered in support of its position are generally consistent with my interpretation of Chinese law and similar to the factual record here.

C. Factual Findings and Specific Interpretations of Chinese Law

1. Applicability of Verification and Chop to Industry-Agreed Output Restrictions

The Price Interpretation outlined earlier is strongly supported by the factual record. First, it is undisputed that, in early 2003, the Chamber distributed an official notice listing the "export prices of commodities reviewed by Customs and agreed by the industry for obtaining an export pre-authorization stamp from the Chamber." (Emphasis added). The notice does not refer to (and includes no field for) any type of output or quantity restrictions for vitamin C or any of the other commodities subject to verification and chop. Notably, Professor Shen makes no attempt to explain this notice.

Second, the circumstances surrounding Weisheng's violation of a shutdown agreement in 2004 also indicate that verification and chop was not intended to enforce production shutdown agreements. This incident is highly probative as it is the only breach of output restrictions during the pre-filing period. I find, as a factual matter, that: (1) this shutdown agreement was not enforced through verification and chop; (2) Weisheng was not punished, in any way, for its breach; and (3) the only reason Weisheng proposed a new shutdown agreement was, as Wang Qi's report explicitly states, "because their production line had problems." Not only is there a complete absence of any statements in the documentary evidence suggesting that the shutdown agreement would

be enforced through verification and chop, but, after Weisheng's violation, Kong Tai stated that he believed that the possibly of Weisheng participating in the new shutdown agreement "was not great." Wang Qi's deposition testimony regarding the absence of any penalty provisions for breaches in the shutdown agreement also indicates that the production shutdown was not enforced through verification and chop—if it had been, specific penalty provisions in the shutdown agreement would not have been necessary. The Price Interpretation is further supported by an NEPG document that discusses the June 2004 shutdown agreement and indicates that defendants viewed the mechanism for controlling prices as distinct from the mechanism for restricting output.

Weisheng's breach also indicates that production shutdown agreements were not compelled in the first instance. Even if there were some explanation as to why the shutdown agreement was not enforced, Kong Tai's statement that the possibility of Weisheng agreeing to participate in the new shutdown agreement "was not great" indicates that neither the Chamber nor the Ministry would have intervened if Weisheng had simply refused to agree to the revised shutdown agreement.

In light of the evidence above, I reject, as incredible and conclusory, the deposition testimony of defendants' employees asserting that Weisheng was penalized by the Chamber and that the Chamber required Weisheng to agree to the revised shutdown agreement.[56]

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56. Although defendants cite to only limited portions of the factual record, even if defendants had relied on all of the deposition

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The evidence discussing the use of verification and chop to enforce defendants' November 2001 agreement does not alter my conclusion that verification and chop was not used to enforce output restrictions. This evidence refers to "price reviews" and never explicitly states that the industry-agreed output restrictions would be enforced through verification and chop.

Finally, I note that the post-filing re-institution of export quotas in 2006 further supports the Price Interpretation. The re-institution of export quotas makes little sense if verification and chop was supposed to enforce output restrictions.

2. Potential Penalties for Non-Compliance with Self-Discipline

The factual record also confirms that there were no material penalties under the 2002 Regime for failing to reach agreements in the first instance. If the threat of membership revocation under the 2002 Regime was

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testimony of their employees, I would reject that testimony. For example, I would reject the deposition testimony of defendants' employees to the extent that they suggest that verification and chop was used to enforce any output restrictions in the pre-filing period. Moreover, based on the evidence concerning Weisheng's breach, the other evidence of voluntariness in the pre-filing documentary evidence and the absence of any affirmative evidence of compulsion in those documents, I would also reject the deposition testimony of defendants' employees asserting that the agreements they reached during the pre-filing period stemmed from compulsory orders from the Chamber. In addition, much, if not all, of this testimony is conclusory.

sufficient to compel defendants' conduct, then Kong Tai would not have stated that it was unlikely that Weisheng would agree to participate in the new shutdown agreement. This incident also indicates that, even when a majority of the members of the Subcommittee wanted to compel one holdout member to reach agreement, they were powerless to do so.

Additionally, it is notable that none of defendants' employees have asserted that the Chamber threatened to revoke Subcommittee membership in order to compel defendants to reach agreements. Rather, defendants' employees claim, in unconvincing testimony, that the Chamber would compel defendants to reach agreement by threatening to withhold chops or export quotas.

In short, "self-discipline" does not involve coercion—as the term "self-discipline" suggests on its face, defendants were engaged in consensual cartelization.

3. Applicability of the 1997 Regime to Defendants' November 2001 Agreement

The factual record supports the conclusion that defendants' compliance with the agreement reached in November 2001 was not governed by the 1997 Regime. One document indicates that when defendants reached agreement in November 2001, they did so under the new legal framework established by the 2002 Regime:

> Analysis from persons within the industry was that the enterprises were able to sit down together at this particular time because VC

> prices had reached rock bottom, and no one could sustain a further slide; the next reason was, *because the country had opened up the commercial products business from a free competition aspect the enterprises were impelled and had no choice but to seek industry self-regulation.*

(Emphasis added). Moreover, the factual record also suggests that the November 2001 agreement was only enforced under the 2002 Regime. As one documents notes, "[t]he [Ministry] and [Customs] actively supported this effort to pre-verify and sign VC product types, requiring the companies to file with [the Chamber] prior to export."

4. Suspension Provision

None of the underlying facts are directly relevant to interpreting the Suspension Provision. There is no evidence that defendants invoked the Suspension Provision over the objections of the Chamber or that the Chamber prevented defendants from suspending verification and chop when defendants so desired. However, the general evidence of voluntariness in the record is, at the very least, consistent with my interpretation of the Suspension Provision.

5. Potential Compulsion and Avoidance of Anti-dumping and Below-Cost Pricing

There is evidence in the record suggesting that, even if the 2002 Regime involved some compulsion, the Chamber and the Ministry would have only compelled

defendants' conduct if anti-dumping suits and below-cost pricing were threatened. One Weisheng document notes that "because the international market has turned for the better considerably when compared with the situation in early 2002, *the willingness and actual effectiveness of various manufacturers to cooperate will be lower than the days when the market had a difficult time.*" (Emphasis added). Although I interpret this document as indicating that all of defendants' agreements were voluntary, if the 2002 Regime did, as a matter of Chinese law, involve some compulsion, I would interpret this document to mean that when the market was not "ha[ving] a difficult time" defendants could reach agreements, but were not required to do so.

It is also notable that, during the pre-filing period, the only Subcommittee meeting attended by a representative of the Ministry addressed dumping concerns.

IV. The Post-Filing Period

Although there appear to have been changes to Chinese law during the post-filing period—changes that are a sufficient reason to distinguish it from the pre-filing period—defendants have still failed to establish compulsion, as matter of Chinese law, during this time. Defendants have not provided me with the "instruction" and "analysis" referenced by Qiao Haili at the November 2005 meeting. Defendants have also not provided any explanation for the re-institution of export quotas in 2006.

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In addition, the factual record does not indicate that Chinese law compelled defendants' conduct during the post-filing period. Although I question the credibility of much of defendants' post-filing evidence, the November 16, 2005 document authored by Wang Qi, which suggests that the Chamber's role was evolving along with the changes in Chinese law, does not appear to have been crafted to serve defendants' litigation position. However, my interpretation of the ambiguous phrases in this document lead me to conclude that, even in November 2005, defendants were still not compelled to reach agreement, particularly regarding output restrictions. Much of this document suggests voluntariness, not compulsion. Even Wang Qi's discussion of "government relations" does not indicate the compulsion necessary to trigger the FSC defense. Rather, this discussion suggests a complex relationship between defendants, the Chamber and the Ministry that, given the evolving changes in Chinese law, was still being sorted out. Although Wang Qi notes that the Chamber "will continue to be a major force in coordinating companies" and that "go[ing] beyond [the] coordination of the [Chamber]" could have some negative consequences, his e-mail suggests that the latter action was, nonetheless, still a potential option. Moreover, it is not clear that the potential negative repercussions of such action would rise to the level necessary to constitute compulsion.

I conclude that Chinese law did not compel defendants' conduct in the post-filing period. Therefore, summary judgment must also be denied as to the post-filing period.

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CONCLUSION

For the reasons explained above, defendants' motion for summary judgment is denied.

SO ORDERED.

/s/
BRIAN M. COGAN
U.S.D.J.

Dated: Brooklyn, New York
September 1, 2011

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED NOVEMBER 6, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-mdl-1738 (DGT)

IN RE VITAMIN C ANTITRUST LITIGATION

November 6, 2008, Decided
November 6, 2008, Filed

MEMORANDUM AND ORDER

TRAGER, J.

Plaintiffs in this case allege that defendants, Chinese corporations that manufacture and sell vitamin C,[1] formed an illegal cartel to fix prices and limit supply for exports of vitamin C, including those to the United States. Plaintiffs bring this action under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. Defendants now move to dismiss, on the grounds that their price-fixing activities were compelled by the Chinese government.

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1. Plaintiffs have filed a second amended complaint adding two defendants that do not manufacture vitamin C. Defendants have moved to dismiss the second amended complaint.

Appendix D

Background

The following facts, which are drawn from the complaints,[2] are assumed to be true for purposes of this motion to dismiss.

China began producing vitamin C in the late 1950s, and by 1969 its scientists had developed a two-stage fermentation process to manufacture vitamin C, resulting in a significant cost advantage compared to European producers. China began employing this technology commercially in the 1980s. Chinese vitamin C manufacturers were able to overcome an early reputation for poor product quality, and now supply a full range of vitamin C products at premium prices. Most sales of vitamin C are of bulk ascorbic acid.

In the early 1990s, European manufacturers F. Hoffmann LaRoche, Ltd., Merck KgaA, and BASF AG and the Japanese company Takeda Chemical Industries, Ltd. dominated the worldwide vitamin C market. From 1990 to 1995, these companies conspired to suppress competition and fix prices for vitamin C. They were sued in *In re Vitamins Antitrust Litigation*, MDL No. 1285, Misc. No. 99-0197 (D.D.C.) (Hon. Thomas F. Hogan). Competition from Chinese manufacturers of vitamin C undermined this early conspiracy during the 1990s, until it reportedly disbanded in late 1995.

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2. There are multiple complaints in this consolidated multi-district litigation action, but all recite essentially the same background facts.

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During 1995, it was reported that thirteen Chinese manufacturers of vitamin C met and agreed to form their own cartel to limit production of vitamin C to stabilize prices. This attempt at market control reportedly failed. From the end of 1995, world vitamin C prices slumped and were cut in half by early 1996. By 1997, there were as many as 22 competitors in the Chinese vitamin C manufacturing market. Strong competition by Chinese competitors during this period allowed the Chinese to drive European manufacturers from the market. By the end of the 1990s, the reduction in vitamin C prices and other factors resulted in industry consolidation in China to four major manufacturers, all of which are defendants in this case - Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome"), Jiangsu Jiangshan Pharmaceutical Co. Ltd. ("Jiangsu Jiangshan"), Northeast Pharmaceutical Group Co. Ltd. ("NEPG") and Weisheng Pharmaceutical Co. Ltd. ("Weisheng") (collectively, the "defendant manufacturers").

The price of vitamin C remained relatively low in 2001, by which time Takeda had withdrawn from the market and sold its manufacturing capacity to BASF. Merck and Roche also announced their intention to withdraw from the vitamin C market. BASF announced that it would halt its new production line in Takeda, Japan. By 2001, defendants had captured approximately 60 percent of the worldwide market for vitamin C. Currently, defendants control 82 thousand metric tons, or approximately 68 percent, of the worldwide production capacity for vitamin C.

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According to the complaints, beginning in December 2001, defendants and their co-conspirators formed a cartel to control prices and the volume of exports for vitamin C. At a meeting of the Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China (the "Association") in December 2001, defendants and the Association reached an agreement for Chinese manufacturers of vitamin C in which they agreed to control export quantities and raise prices. The cartel members agreed to restrict their exports of vitamin C in order to create a shortage of supply in the international market. Specifically, the cartel members agreed to "restrict quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically." The complaints further allege that the agreements of the cartel members were facilitated by the efforts of their trade association.

According to the complaints, the formation of the cartel in December 2001 led to price increases of vitamin C in the United States from approximately $2.50 per kilogram in December 2001 to as high as $7 per kilogram in December 2002. Defendant China Pharmaceutical reported in its 2003 annual report that average prices during 2002 rose from $3.20 per kilogram to $5.90 per kilogram, an 84 percent increase. China Pharmaceutical also allegedly reported that gross profit margins for its vitamin C production were 60.2 percent in 2002, an increase of 28.1 percent.

Plaintiffs allege that together, defendants' sales constitute approximately 60 percent of the worldwide

vitamin C market and "virtually 100 percent of the manufacturers who can produce vitamin C for a cost below $4.50 to $5 per kilogram." Plaintiffs acknowledge that non-cartel members BASF and DSM control 30 to 40 percent of the worldwide market for vitamin C, but note that the European manufacturers have higher manufacturing costs for vitamin C than Chinese manufacturers.

The complaints allege that following the collusive price increases in 2002, during 2003 the combination of the cartel's supply restrictions and increases in world demand for vitamin C - attributable in part to the outbreak of SARS in Spring and Summer of 2003 - allowed the cartel to achieve prices as high as $15 per kilogram in April 2003. By the third quarter of 2003, however, cartel members began reducing prices to increase their sales. According to the complaints, despite the price cuts, prices remained substantially above competitive levels.

Plaintiffs allege that the Association called an "emergency meeting" in late November or December 2003 to address the price cutting, which was attended by representatives of each of the defendants. At the meeting, the Association discussed with defendants how they would rationalize the market and limit the production of vitamin C to increase prices.

In December 2003, defendants and members of the Association also met at the annual China Exhibition of World Pharmaceutical Ingredients, where they devised plans to rationalize the market and limit production levels and increase prices. The Association warned defendants

that it was impossible for any of them to monopolize the market to the detriment of the others. As a result of the meetings and other efforts by cartel members, prices for vitamin C in December 2003 increased from $4.20 per kilogram at the beginning of the month to over $9 per kilogram by the end of the month.

In June 2004, following some price declines, defendants agreed to shut down production for equipment maintenance in order to boost prices back toward their December 2003 highs. Defendants also agreed to restrict exports to the United States to further stabilize prices. Plaintiffs allege that defendants' anticompetitive activities are ongoing.

Defendants move to dismiss on grounds of act of state, foreign sovereign compulsion and international comity. In addition, plaintiffs have filed a second amended complaint adding a direct purchaser plaintiff and two defendants. The two newly added defendants and, separately, the original defendants, move to dismiss the second amended complaint for failure to include any factual allegations regarding the newly added defendants or to explain how their addition affects the conspiracy alleged in the second amended complaint.

Appendix D

Discussion

(1)

Motion to dismiss under act of state, foreign sovereign compulsion and international comity doctrines

Defendants do not deny the allegations in the complaints for purposes of their motion to dismiss. Rather, they argue that their actions were compelled by the Chinese Ministry of Commerce ("Ministry").[3] They invoke the doctrines of act of state, foreign sovereign compulsion and international comity as defenses to suit. Each of these defenses rests on different doctrinal underpinnings, but they are all premised on an act by a foreign government.

The act of state doctrine derives from both separation of powers and respect for the sovereignty of other nations. It holds that the courts of one nation may not sit in judgment of the public acts of another sovereign within its own borders. *See Republic of Austria v. Altmann*, 541 U.S. 677, 700, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004). The reasons for the doctrine were outlined by the Supreme Court over a century ago:

> Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of

3. The Ministry was formerly known as the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"). Both entities will be referred to as the Ministry herein.

> another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). Thus, any censure of another country's acts within its own territory is reserved to diplomatic channels and does not come within the purview of the courts. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304, 38 S. Ct. 309, 62 L. Ed. 726 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." (internal quotation marks omitted)). The Supreme Court has built upon the foundations of the act of state doctrine to note that, in the context of adjudicating the legality of expropriations by a foreign state, "[p]iecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). Thus, the act of state doctrine is aimed at reserving for the executive branch decisions that may significantly affect international relations.[4]

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4. A plurality of the Supreme Court has recognized a commercial exception to the act of state doctrine, pursuant to which "the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Alfred*

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The defense of foreign sovereign compulsion, on the other hand, focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states. Rather than being concerned with the diplomatic implications of condemning another country's official acts, the foreign sovereign compulsion doctrine recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's.

Finally, international comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and

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Dunhill of London, Inc. v. The Republic of Cuba, 425 U.S. 682, 695, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976). The Second Circuit, however, has not adopted this exception. *See Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) ("We leave for another day consideration of the possible existence in this Circuit of a commercial exception to the act of state doctrine under *Dunhill*."). Even if the exception were recognized within this Circuit, defendants and the Ministry have made a compelling argument for why the Chinese government's involvement - to the extent it exists - in defendants' price-fixing scheme amounts to a public, rather than commercial, act. Namely, they argue that the government was working to guide the vitamin C industry in China's transition from a command to a market economy. If so, and if - as defendants and the Ministry argue - defendants were acting in a governmental capacity when they fixed prices, it is not even clear that the Sherman Act would apply, as it is directed at private actors.

> convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895). The Ninth and Third Circuits have each set forth a list of factors to be weighed in determining whether to assert jurisdiction, [5] but in any event, abstention from

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5. The factors given by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) are:

> [1] the degree of conflict with foreign law or policy,
>
> [2] the nationality or allegiance of the parties and the locations or principal places of businesses or corporations,
>
> [3] the extent to which enforcement by either state can be expected to achieve compliance,
>
> [4] the relative significance of effects on the United States as compared with those elsewhere,
>
> [5] the extent to which there is explicit purpose to harm or affect American commerce,
>
> [6] the foreseeability of such effect, and
>
> [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The factors listed by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) are:

> 1. Degree of conflict with foreign law or policy;
>
> 2. Nationality of the parties;

exercising jurisdiction for reasons of international comity depends on the existence of a "true conflict between domestic and foreign law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). No conflict exists for this purpose unless Chinese law requires defendants "to act in some fashion prohibited by the law of the United States," or unless defendants "claim that their compliance with the laws of both countries is otherwise impossible." *Id.* at 799.

These defenses rest on facts that are not found within the complaints - namely, whether the Chinese

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3. Relative importance of the alleged violation of conduct here compared to that abroad;

4. Availability of a remedy abroad and the pendency of litigation there;

5. Existence of intent to harm or affect American commerce and its foreseeability;

6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

8. Whether the court can make its order effective;

9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10. Whether a treaty with the affected nations has addressed the issue.

government required defendants to fix prices in violation of the Sherman Act. Nevertheless, defendants insist that this case may be properly dismissed at the pleadings stage[6] because the Ministry has submitted an amicus brief detailing the Ministry's role in orchestrating and maintaining the vitamin C cartel. According to defendants, the Ministry's brief must be accepted as true, because it is the official position of the government of China.

a. The Ministry's amicus brief

The Chinese government's appearance as amicus curiae is unprecedented. It has never before come before the United States as amicus to present its views. This fact alone demonstrates the importance the Chinese government places on this case.

The Ministry is the "highest administrative authority in China authorized to regulate foreign trade," and is "the equivalent in the Chinese governmental system of a cabinet level department in the U.S. governmental system." Ministry Br. at 1. The Ministry argues that the body plaintiffs have characterized as a "trade association"

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6. Defendants assert that courts "routinely consider, and often grant, dismissal of [similar] cases ... at the Rule 12 motion stage," but they cite only four cases, all of which were decided between 1971 and 1983. Of those four, one was decided after discovery was completed, *Van Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977), and three were dismissed based on the allegations in the complaint, *see Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1975); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971).

that facilitated the actions of the alleged cartel is in fact the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber"). The Chamber is "an entity under the Ministry's direct and active supervision that plays a central role in regulating China's vitamin C industry." Ministry Br. at 5. In contrast to the voluntary, non-governmental chambers of commerce that exist in the United States, chambers of commerce in China have played a central role in China's shift from a command economy to a market economy. *Id.* at 7. In particular, the Ministry asserts that the Chamber stepped into the shoes of stated-owned national exporting entities when those entities stopped regulating exports of pharmaceutical products, including vitamin C. *Id.*

The Chamber had its origins in 1991, when the Ministry promulgated Measures for Administration over Foreign Trade and Economic Social Organizations. Mitnick Decl. Ex. D ("Ministry Measures"). Article 14 of the Ministry Measures dictates that "Social organizations established with coordination and industry regulation functions *as authorized by* [the Ministry] must implement the administrative rules and regulations relating to foreign trade and economy." *Id.* at 5 (emphasis added). The Ministry represents that the Chamber was one of those social organizations authorized to implement rules and regulations, thus imbuing it with governmental regulatory authority. Indeed, the Ministry asserts that the Chamber "act[s] in the name, with the authority, and under active supervision, of the Ministry," thus performing "a governmental function so authorized under Chinese law." Statement in *In re Vitamin C Antitrust Litigation*,

June 9, 2008. The Ministry Measures further provide in Article 17 that the Ministry "shall be directly responsible for the daily management of social organizations established with coordination and industry regulation functions." Ministry Measures, at 5.

In 1997, the Ministry and State Drug Administration ("SDA") issued a notice ("the notice") requiring strict control of vitamin C production, in light of "intense competitions and challenges from the international market." 1997 MOFTEC & SDA Notice, Mitnick Decl. Ex. H at 1. The notice required the Chamber to establish a Vitamin C Coordination Group (later known as the Vitamin C Sub-Committee), which was to "coordinate with respect to Vitamin C export market, price and customers, and to organize the enterprises in contacting foreign entities." *Id.* ¶ 6. The notice further explained that "[t]he specific method for coordination shall be formulated by the Chamber, and filed to [the Ministry] for record." *Id.*

In 1998, the Ministry acknowledged and approved a request (apparently from the Chamber) to establish a Vitamin C Sub-Committee within the Chamber. Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters, Mitnick Decl. Ex. F. The Ministry declared that "[t]he major responsibilities of VC Sub-Committee are: to be responsible for coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce in the world market and promote the healthy development of Vitamin C export to China." *Id.* The Sub-Committee

charter ("the charter"), which predated the formal establishment of the Sub-Committee by several months, provides that the Sub-Committee "shall coordinate and administrate market, price, customer and operation order of Vitamin C export." Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, Mitnick Decl. Ex. G, Art. 7.

The charter limits membership in the Sub-Committee to vitamin C exporters whose export volume in any year from 1994 to 1996 exceeded 200 tons, and specifies that "[o]nly members of the Sub-Committee have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." *Id.*, Arts. 11, 12. The charter goes on to list among members' obligations that members "shall voluntarily adjust their production outputs according to changes of supplies and demands on international market." *Id.*, Art. 15(3). The charter also requires members to "strictly execute export coordinated price set by the Chamber and keep it confidential." *Id.*, Art. 15(6).

The charter provides for sanctions for "failure to perform any member's obligation," including "warning, open criticism and even revocation of its membership." *Id.*, Art. 16. In describing the ultimate penalty for non-compliance, the charter notes that the Sub-Committee "will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member." *Id.*

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In 2002, the Ministry changed the method of price review "in order to accommodate the new situations since China's entry into WTO." 2002 MOFTEC & Customs Notice, Mitnick Decl. Ex. J at 1. The new regulation subjected 30 categories of export products (including vitamin C) to "Price Verification and Chop" by their respective chambers, and no longer subjected them to supervision and review by customs. *Id.* ¶ 1. The procedure for Price Verification and Chop calls for exporters to send the export contracts to the relevant chambers for verification before Customs declaration. Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (No. 36,2003) ("Announcement No. 36,2003"), Exhibit 2: Procedures for Implementing the Verification and Chop System on Export Commodities ¶ A, Mitnick Decl. Ex. K. "If it is verified that the contracts comply, the Chamber shall fill in the Verification and Chop Form of China Chamber of Commerce for the relevant chamber and affix the counter-forgery V&C chop to the V&C Form and to the export contracts at the blocks where the prices and quantities are specified, and then deliver them back to the exporters." *Id.* Customs will only allow for export those shipments that are accompanied by export contracts with the required chop. Announcement No. 36,2003.

Based on this regulatory framework for the Chamber and Vitamin C Sub-Committee, defendants and the Ministry argue that defendants were compelled under Chinese law to collectively set a price for vitamin C exports. Although they are careful to note that "the

Ministry itself did not decide what specific prices should be," Ministry Br. at 13, defendants and the Ministry assert that defendants could not have exported vitamin C that did not conform to the agreed-upon price.

b. The underlying documents

Plaintiffs attack the exhibits attached to the Ministry's brief as mere notices and charter documents of a nongovernmental organization. They allege that the Ministry has not pointed to a single law or regulation compelling a price or price agreement at issue in the Complaint. They note, furthermore, that the price collusion complained of in the Complaint began in December 2001, long after the Chamber and Vitamin C Sub-Committee were established and purportedly compelled to set prices, and only after defendants had achieved the market power necessary to sustain above-market prices.

Plaintiffs point to publicly available records of the Chamber and its Vitamin C Subcommittee in support of their position that defendants' price agreements were voluntary:

> In December 2001, efforts by the Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, each *domestic manufacturers were able to reach a self-regulated agreement successfully*, whereby they would *voluntarily control* the quantity and pace of exports, to achieve the goal of stabilization while raising

> export prices. Such *self-restraint measures*, mainly based on "restricting quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically" *have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention.*[7]

Printout from website of China Chamber of Commerce of Medicines and Health Products Importers and Exporters Information, Pls.' Mem. in Opp'n to Defs' Mot. to Dismiss ("Pls.' Opp'n"), Ex. D (emphasis added).

Plaintiffs also rely on an expert in Chinese law, Professor James V. Feinerman, who concludes based on a review of the Ministry's brief and its exhibits that defendants' conduct was not compelled by Chinese law. Pls.' Opp'n Ex. K ("Feinerman Decl."). As an initial matter, Professor Feinerman disputes the authenticity of many of the Ministry's exhibits, on the basis that they do not contain a chop, that they are not governmental laws or regulations, that they are not specific to vitamin C, or that they are mis-translated. Regarding the Ministry's 1998 approval of a request to establish the Vitamin C Sub-Committee, Professor Feinerman notes that the

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7. The Ministry argues that such documents should not be taken at face value. The Ministry argues that many of the terms appearing in defendants' and the Chamber's documents have meanings in the context of China's government and economic policy that are quite different from their literal translations. Among the controversial terms are "social organization," "voluntary self-restraint," "coordination," "industry self-discipline," and "verification."

document merely "authorizes the creation of the entity." *Id.*, ¶ 16. He points out that this "reflects the reality in China that an organization not expressly allowed would be prohibited, in contrast to the long-standing Western norm that anything not expressly prohibited is allowed." *Id.* Accepting Professor Feinerman's characterization leads to the conclusion that a cartel in China could only exist with governmental sanction. At that point it becomes difficult to differentiate between a cartel that was voluntarily formed by its members, who then had to seek governmental approval, and a cartel that was mandated by governmental fiat.

With the benefit of discovery, plaintiffs submitted a supplemental memorandum and exhibits which, they contend, demonstrate that defendants voluntarily restricted export volume and fixed prices for vitamin C. For example, the minutes from a November 16, 2001 meeting of defendants held under the auspices of the Chamber show that the defendants agreed by hand voting to restrict output and fix prices at CIF 3.00/kg effective January 1, 2001. Minutes of Meeting by Officials of Vitamin C Manufacturers, Pls.' Supp. Mem. in Opp'n to Defs.' Mot. to Dismiss ("Pls.' Supp. Mem.") Ex. 14 at 3-4.

Defendants admit that the minimum export price subject to verification and chop has been $3.35 per kilogram since May 2002. Northeast Pharma. Group Co.'s Third Amended Response to Pls.' Second Set of Interrogatories, Pls.' Supp. Mem. Ex. 2 at 18. Notwithstanding this mandated price, defendants have sold vitamin C above that price since its implementation.

Dep. of Ning Hong, Pls.' Supp. Mem. Ex. 5 at 68-70. For example, according to documents produced by defendant Jiangsu Jiangshan, in June 2003

> [O]ur company organized a meeting on market analysis among the six domestic manufacturers and the China Chamber of Commerce of Medicines & Health Products in Qing Dao. *We all agreed to set the floor price at 9.20 USD/kg*, hoping to slow down the speed of market price falling, also hoping to strengthen the confidence of middle suppliers and customers. Looking at the effect a couple of weeks later of this month, the effect of this price limitation is very limited, every manufacturer quoted prices lower than the floor price.

Import/Export Department June Work Summary ¶ 5, Pls.' Supp. Mem. Ex. 8 (emphasis added).

In addition, the person responsible for negotiating export contracts for one of defendants testified in his deposition that he was aware of some price having been mandated by the government, but he could not remember what it was. Dep. of Ning Hong, at 68.[8] This testimony suggests that the hand of government was not weighing

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8. The deponent testified as follows:

> Q. Does the Chamber review the contracts to determine whether a minimum export price has been met?
>
> A. They might, I think they should.

as heavily on defendants as defendants and the Ministry would have this court believe.

Several of the documents plaintiffs attach as exhibits to their supplemental brief appear to be notes from meetings or the musings of defendants' employees. As such, it is unclear whether they would qualify as business records or otherwise be admissible as evidence. Although their provenance is unclear, these documents do provide glimpses into what may have been defendants' thinking regarding price-fixing. For example, plaintiffs have procured a document entitled "Thought on Coordinated Production Termination," in which the author writes:

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* * *

Q. Are you the main person responsible for negotiating prices of vitamin C with U.S. customers?

A. Yes, I handled the very specific processes. I do that.

Q. Are you aware of any minimum export price today for vitamin C?

A. I think so. I feel that it might be.

Q. Do you know what it is?

A. I can't recall.

* * *

Q. No one has ever told you that the Chamber won't approve a contract with a price below $335 cents, have they?

A. I cannot recall.

Dep. of Ning Hong, at 68-70.

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> We are reluctant to admit the fact that the chamber of commerce will continue to be a major force in coordinating companies of this industry, particularly in a difficult situation. The role of the chamber of commerce as the industrial association will be intensified rather than weakened in the future. Therefore, there is no need for us to go beyond coordination of the chamber of commerce, which will do no good to our current or future work. The work of the chamber of commerce will be supported by the Ministry of Commerce. We should not regard the coordination simply as authoritarianism of the chamber of commerce.

Thought on Coordinated Production Termination, Pls.' Supp. Mem., Ex. 12.[9] The author continues:

> The act of deciding production or prices based on coordination is a kind of monopoly whatever the reasons. However, I believe we should not have any worry since the Ministry of Commerce is a friend of the court in the lawsuit. If we won the lawsuit, it would be hard for foreigners to make more trouble. Even if we lost the case, the government would take the foremost part of responsibility. After all, we need to do many things in a more hidden and smart way.

Id.

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9. Plaintiffs do not describe the source of this document. It bears Bates number JJBA11-1.

Documents such as these - if they are to be credited suggest a complex interplay between the Chamber and defendants that makes it difficult at this stage to determine the degree of defendants' independence in making pricing decisions.

c. Authority of the brief

The authority of the Ministry's brief is critical to defendants' motion, because, as noted above, the documents on which defendants rely to demonstrate governmental compulsion of their anti-competitive acts suggest on their face that defendants' acts were voluntary rather than compelled. Defendants contend that the Ministry's brief must be taken as conclusive on the issue of Chinese law - and particularly on the question of whether defendants' conduct was mandated by Chinese law, citing *United States v. Pink*, 315 U.S. 203, 218-21, 62 S. Ct. 552, 86 L. Ed. 796 (1942), and *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919). In *Pink*, the Court was determining the intended extraterritorial effect of a Russian decree, and was presented with an official declaration from the Russian official charged with interpreting existing Russian law. 315 U.S. at 220. The Court held that the declaration was "conclusive" on the issue of the Russian decree's intended extraterritorial effect. *Id.* Similarly, the Second Circuit in *American Can* had before it a certificate from the Russian ambassador to the United States, which it accepted as "binding and conclusive ... on the matters to which it relates." 258 F. at 368-69.

Plaintiffs counter that Fed. R. Civ. P. 44.1, which was first adopted in 1966, permits a court to "consider any relevant material or source, including testimony," when determining foreign law. Plaintiffs assert that Rule 44.1 allows courts wide discretion to determine foreign law, and that they are not bound to accept the assertions of foreign sovereigns.

Indeed, post-Rule 44.1 decisions from the Second Circuit have adopted a softer view toward the submissions of foreign governments. In *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70 (2d Cir. 2002), the Ministry of Finance of the Republic of Indonesia asserted that under Indonesian law, certain funds belonged to the Republic of Indonesia. The Second Circuit agreed that "a foreign sovereign's views regarding its own laws merit - although they do not command - some degree of deference." *Karaha Bodas*, 313 F.3d at 92. After independently analyzing the relevant Indonesian law, the court accepted the Republic of Indonesia's interpretation, noting: "Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." *Id.*

More recently, the Second Circuit opted not to follow an affidavit from the Chilean Corporation of Judicial Assistance of the Region Metropolitana ("Central Authority") regarding a child custody matter under the Hague Convention. *Villegas Duran v. Arribada*

Beaumont, 534 F.3d 142, 148 (2d Cir. 2008). There was a question of whether the Central Authority had all the relevant information at the time it made its affidavit, but the court held that "even if [the affidavit] is authoritative, the district court was not bound to follow it." *Id.* (citing *Karaha Bodas*, 313 F.3d at 92).

The Ministry's Brief is, therefore, entitled to substantial deference, but will not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position.

d. Role of the Chinese government in defendants' agreement to fix prices

All three of defendants' defenses rest on the proposition that their collusion on prices for vitamin C was due to acts of the Chinese government. Although the parties argue whether the defenses raised by defendants are jurisdictional, the issue at this stage of the case is whether there is a factual dispute as to the alleged compulsion.[10]

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10. The Ministry asserts that if the court exercises jurisdiction over this action "[i]t cannot be denied that the possibility of insult to China is significant." Ministry Br. at 22. Not every court agrees with this basis for abstention. The Ninth Circuit has noted:

> Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they tailor their rulings to accommodate a non-party .... If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way

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Many of the cases defendants rely upon in support of their motion to dismiss involved much clearer examples of government compulsion. For example, the court in *Trugman-Nash, Inc. v. New Zealand Diary Board*, 954 F. Supp. 733 (S.D.N.Y. 1997), was charged with considering the effect of the New Zealand Dairy Board Act of 1961, a formally codified New Zealand law. In that case the court interpreted the language of the statute as "mandat[ing] Board disapproval of sales price competition among New Zealand dairy producers in respect of exports to nations like the United States that restrict import quantities." *Id.* at 736. Accordingly, the court held that there was "an actual and material conflict between American antitrust law and New Zealand law in respect of the marketing of dairy export produce," entitling defendants "to invoke the doctrines of act of state, foreign sovereign compulsion, and international comity." *Id.*

Similarly, the Second Circuit has applied the act of state doctrine to affirm dismissal of an antitrust case brought by a liquid bulk cargo tanker service that was shut out from importing and exporting Colombian liquid gas that challenged Colombia's cargo reservation laws. *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 450 (2d Cir. 1987). Colombia began

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> they deem appropriate - up to an including passing legislation.... If courts were to take the interests of foreign governments into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation...."

Patrickson v. Dole Food Co., Inc., 251 F.3d 795, 803-05 (9th Cir. 2001) (Kozinski, J.).

enforcing a series of cargo reservation laws it had passed years before which required that imports and exports of certain types of cargo be transported exclusively by Colombian carriers, and the plaintiff sued the beneficiaries of these laws for violations of the Sherman Act, including conspiracy to fix prices. *Id.* at 450-51. Although the plaintiff alleged that the defendants manipulated the Colombian government into implementing the cargo reservation laws, the court held that the plaintiff's allegations "make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on." *Id.* at 452-53. The court refused to investigate the motives of the Colombian government, stating: "When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims made under the antitrust laws are dismissed." *Id.* at 453.

Other cases relied upon by defendants were decided on a fuller record. For example, defendants rely heavily on *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), as a case supporting their argument of foreign sovereign compulsion. That case was decided on summary judgment, however, after discovery was complete. *Id.* at 1302. The case involved a boycott against an oil refiner by suppliers of Venezuelan crude oil which held concessions from the Venezuelan government. The defendants argued that their boycott was ordered by the Venezuelan government, and the court granted summary judgment based on its conclusion that the defendants had, indeed, been compelled by their government to boycott the plaintiff.

The court refused to consider whether the order to boycott was "legal or 'compulsive' under the laws of Venezuela," holding that "[o]nce governmental action is shown, further examination is neither necessary nor proper." *Id.* at 1301. Nevertheless, the court explicitly noted in that case that "[n]othing in the materials before the Court indicates that defendants either procured the Venezuelan order or that they acted voluntarily pursuant to a delegation of authority to control the oil industry." *Id.* at 1297. In this case, on the other hand, the parties vigorously dispute whether defendants instigated formation of the Vitamin C Sub-Committee and whether defendants' actions in fixing prices were voluntary.

Thus, although both *Trugman-Nash* and *O.N.E. Shipping* involved dismissals of antitrust suits due to the involvement of foreign governments in anticompetitive activities, they differ from the present case in that there was no dispute in those cases as to the effect of the respective governmental acts. Here, on the other hand, the parties hotly contest both the origin and even existence of government compulsion. The Ministry has been forthright in its admission that Chinese law is not as transparent as that of the United States or other constitutional or parliamentary governments.[11] Rather than codifying its statutes, the Chinese government apparently frequently

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11. At oral argument, counsel for the Ministry explained:

> [T]he laws of the government of China do not have . . . quite the same transparency as the laws of the United States, in the sense that there are statute books that are available, that there are lengthy Congressional statements of intent, where you can read what the debates were all about.

governs by regulations promulgated by various ministries. In addition, according to the Ministry, private citizens or companies may be authorized under Chinese regulations to act in certain circumstances as government agents. June 9, 2008 Statement in *In Re Vitamin C Antitrust Litigation* at 2.

It is this last circumstance that so complicates the question of compulsion in this case. It is not clear from the record at this stage of the case whether defendants were performing government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens. Indeed, even the formation of the Vitamin C Sub-Committee is shrouded in mystery, as it was apparently authorized in response to a request by unidentified applicants who were, quite likely, defendants here.

If defendants wished to form a cartel, they would have had to ask for government sanction, at least according to plaintiffs' expert, who opined that in China "an organization not expressly allowed would be prohibited." Feinerman Decl. ¶ 16. It is not clear that this scenario of defendants making their own choices and then asking

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> The way the Chinese system operates is that you have the state council and the state council is then composed of a number of key ministries. The Ministry of Commerce is not some backwater regulator in a small city in China. The Ministry of Commerce is the preeminent regulator of the economy, export economy of the People's Republic.

Tr. of Mot., June 5, 2007, at 46-47.

for the government's imprimatur - which may or may not have occurred in this case - would qualify as the type of governmental act or compulsion contemplated by the defenses raised by defendants.

In support of their motion, defendants and the Ministry stress the importance to China of being able to manage the transition from a command to a market economy. The court does not question that goal or even China's methods of doing so. But the record as it stands is simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions.[12] Accordingly, defendants' motion to dismiss is denied.

(2)

Motions to dismiss second amended complaint

Plaintiffs filed a second amended complaint ("SAC") adding Magno-Humphries Laboratories, Inc. ("MHL") as a direct purchaser class representative and adding JSPC America, Inc. ("JSPC") and Legend Ingredients Group, Inc. ("Legend") as defendants. The SAC explains that MHL directly purchased vitamin C and vitamin C products from JSPC and Legend. SAC ¶ 9. JSPC and Legend are described as California corporations that

12. One area that appears to be ripe for discovery is the degree to which defendants coordinated pricing before and after December 2001. If the apparatus and mandate for price-fixing was in place as of 1991 (when the Chamber was formed) or 1997 (when the Vitamin C Sub-Committee was formed), but no price-fixing occurred until market power was achieved, plaintiffs would have a stronger argument that defendants' actions were voluntary.

were (in the case of JSPC) or are (in the case of Legend) subsidiaries or affiliates of Jiangsu Jiangshan during the class period. *Id.* ¶ 12, 13. Other than these identifications of MHL, JSPC and Legend, the SAC copies verbatim the allegations of the first amended complaint, which are summarized above.

JSPC and Legend move to dismiss the SAC as to themselves because the SAC does not make any allegations against them personally. The original defendants move to dismiss the SAC in its entirety because, they contend, the addition of JSPC and Legend fundamentally changes the conspiracy that had been alleged in the earlier complaints. Specifically, the earlier complaints alleged a horizontal conspiracy among Chinese vitamin C manufacturers. According to defendants, however, JSPC and Legend are, or were, California corporations that never manufactured vitamin C. Thus, their addition changes the conspiracy charged from a horizontal conspiracy to a hybrid horizontal/vertical conspiracy, the details of which are not disclosed in the SAC. All defendants argue that the SAC falls short of the pleading standards set forth by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007), and by the Second Circuit in *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007).

Plaintiffs respond that the SAC is remarkably detailed in its description of the conspiracy, and that it goes above and beyond the requirements of *Twombly* and *In re Elevator Antitrust Litig.*. Plaintiffs further argue that those cases do not establish heightened pleading standards

for antitrust cases. That may be true, but even Fed. R. Civ. P. 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The SAC is indeed quite detailed in its pleading of a conspiracy among Chinese vitamin C manufacturers, but it does not explain how two California resellers could have been part of the manufacturer cartel. Thus, the SAC both fails to provide notice to JSPC and Legend as to what they are alleged to have done wrong and changes the nature of the originally-charged conspiracy.

Accordingly, the SAC is dismissed with leave to replead within 30 days to allege what actions JSPC and Legend have taken that have harmed plaintiffs.

Conclusion

For the foregoing reasons, defendants' motion to dismiss the complaints under the act of state doctrine, foreign sovereign compulsion and international comity is denied. Defendants' motions to dismiss the SAC are granted. Plaintiffs have 30 days to replead the SAC to make allegations against JSPC and Legend.

Dated: Brooklyn, New York
November 6, 2008

SO ORDERED:

/s/
David G. Trager
United States District Judge

APPENDIX E — BRIEF OF *AMICUS CURIAE* THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, DATED JUNE 29, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MASTER FILE 06-MD-1738
(DGT)(JO)

IN RE

VITAMIN C ANTITRUST LITIGATION

This Document Relates To:

ALL CASES

BRIEF OF *AMICUS CURIAE* THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA IN SUPPORT OF THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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[TABLES INTENTIONALLY OMITTED]

Appendix E

INTEREST OF THE *AMICI*

In this lawsuit, plaintiffs seek to recover treble damages from four Chinese manufacturers of vitamin C, and the affiliates of one of these manufacturers, based on conduct that was compelled by Chinese law. Because the conduct that allegedly violated U.S. antitrust law occurred entirely in the territory of China, and because the defendants were required by the laws of China to engage in that conduct, this lawsuit cannot be resolved without interfering with Chinese industrial policy respecting the operation of domestic firms within China and without impermissible inquiry into the motives of the Chinese government. Accordingly, three closely related doctrines, the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity, mandate dismissal of this action.

Amicus the Ministry of Commerce of the People's Republic of China (hereinafter "the Ministry")[1] is deeply interested in the prompt and proper resolution of this lawsuit. The Ministry is a component of the State Council (the central Chinese government) and is the highest administrative authority in China authorized to regulate foreign trade, including export commerce. It is the equivalent in the Chinese governmental system of a cabinet level department in the U.S. governmental system. The Ministry formulates strategies, guidelines

1. The Ministry was initially known as the Ministry of Foreign Trade and Economic Cooperation. This brief uses the term "Ministry" to refer to both this predecessor entity and the current Ministry of Commerce.

and policies concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system.

If this Court were to find the defendants' conduct violated U.S. antitrust laws, it would improperly penalize defendants for the sovereign acts of their government and would adversely affect implementation of China's trade policy. The Ministry therefore files this brief to inform the Court of the regulatory scheme that governed defendants during the period encompassed by the Complaint[2] and that dictated the conduct alleged to violate U.S. antitrust laws. The Ministry accordingly supports the defendants' request that this action be dismissed.

The information the Ministry is providing is properly considered in connection with a motion to dismiss under Rule 12(b) because each of the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity implicate this Court's subject matter jurisdiction. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 141 n.6 (2d Cir. 2001) (a district court "must" consider materials outside complaint if they "may result in the dismissal of the complaint for want of jurisdiction"). Indeed, both the United States Supreme Court and the Second Circuit have recognized that the statements of a foreign government about the scope and

2. The "Relevant Period" referenced in the Complaint is December, 2001 through the present.

meaning of its laws are to be given binding and conclusive effect by U.S. courts. *See U.S. v. Pink*, 315 U.S. 203, 218-21 (1942) (statement of Soviet Commissariat for Justice concerning extraterritorial effect of nationalization decree deemed "conclusive"); Agency of *Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919) (authoritative representation by Russian government is "binding and conclusive in the courts of the United States"). Since 1978, the U.S. government has encouraged foreign governments to present their views concerning pending judicial proceedings directly to the U.S. courts,[3] and the U.S. Solicitor General has taken the position that a foreign government's submission of its views in the form of an amicus curiae brief should be "dispositive."[4]

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3. *See* Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *reprinted in* U.S. Dep't of State, 1978 Digest of United States Practice in International Law 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979); Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in* U.S. Dep't of State, 1978 Digest of United States Practice in International Law 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979); *see also* Letter from Deputy Legal Adviser Marks (June 15, 1979) (described in 73 Am. J. Int'l L. 669, 678-79 (1979)). A copy of the foregoing is submitted herewith as Exhibit A to the declaration of Joel M. Mitnick, dated June 29, 2006 ("Mitnick Decl.").

4. *See* Brief for United States as Amicus Curiae Supporting Appellants, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1985) (No. 83-2004) at 17 (explicit and detailed statement by foreign government should be "given dispositive weight"), Mitnick Decl., Ex. B.

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It is particularly appropriate to accord the views of the Ministry dispositive weight here because the Complaint employs terms that have very different meanings under Chinese law, and within the Chinese regulatory system, than those same terms have in the United States. Plaintiffs allege that a Chinese "trade association" facilitated an illegal cartel, which "coordinated" vitamin C export pricing as part of a series of "voluntary" or "self-restraint" agreements. In fact, the "association," or "social organization," is a Ministry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels, and the price "coordination," or so-called "voluntary self-restraint," it facilitated is a government-mandated price and output control regime. Because China's ongoing transition from a state-run command economy to a market-driven economy is utterly foreign to the economic history and traditions of the United States, there is a very significant risk of misunderstanding by U.S. lawyers and judges of the regulatory concepts China has adopted to manage this transition. Accordingly, the Ministry files this amicus brief to explain those very different concepts as well as to emphasize that the conduct alleged in the complaints here is mandated by Chinese law. Properly understood, China's regulation of vitamin C exports mandates dismissal of this lawsuit.

BACKGROUND

I. Allegations of the Complaint

In January 2005, Plaintiffs Animal Science Products Inc. and the Ranis Company ("plaintiffs") filed the first

Complaint in this action (the "Complaint")[5] in which they allege that defendants, four Chinese manufacturers and exporters of raw vitamin C products, and affiliates of one of these manufacturers,[6] violated Section I of the Sherman Act by agreeing on the price and volume of vitamin C products exported from China to the United States.

Specifically, plaintiffs allege that the defendants formed "a cartel to control prices and the volume of exports for vitamin C .... [and] successfully reached an autonomy agreement" in which they allegedly agreed "to control export quantities and achieve stable and enhanced price goals," "to restrict their exports of vitamin C in order to create a shortage of supply in the international market," and "to 'restrict quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically.'" Compl. ¶ 43. Plaintiffs allege that, as a result of the cartel, the prices of vitamin C products exported from China to the United States increased from $2.50 per kilogram in December, 2001, to as high as $7 per kilogram in December, 2002, and that they, as purchasers of vitamin C products, were forced to pay higher prices as a result. Compl. ¶ 45.

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5. Subsequent complaints have not been consolidated into a single complaint, but all of the complaints make substantially identical allegations.

6. The Chinese defendants are: Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co. Ltd., Northeast Pharmaceutical Group Co. Ltd., Weisheng Pharmaceutical Co. Ltd., and China Pharmaceutical Group, Ltd. In addition, the Ministry is informed that a defunct U.S. affiliate of one of these defendants was also named in the Complaint.

Plaintiffs further allege that in 2003, defendants met and agreed to limit production levels further and increase prices (Compl. ¶ 52), and that in 2004, defendants agreed to suspend production in an effort to stabilize prices (Compl. ¶ 56).

Plaintiffs claim that the meetings held by defendants, and the agreements to which defendants were party, were "facilitated by the efforts of their trade association," the Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China.[7] Compl. ¶ 43. This "association," it is alleged, also "coordinated" the meetings at which defendants agreed to the limitations of sales and exports to the United States (Compl. ¶ 46), called a late 2003 "emergency meeting" attended by the defendants in which the "association" discussed how the defendants were to "rationalize the market and restrain and limit the production levels of vitamin C to increase prices" (Compl. ¶ 53), and met with the defendants at the "China Exhibition of World Pharmaceutical Ingredients," during which they "devised plans to rationalize the market and to limit production levels and increase prices" (Compl. ¶ 54).

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7. The official Chinese name of this entity translates as the "Chamber of Commerce of Medicines and Health Products Importers and Exporters." As described *infra*, this entity, among other things, regulates China's import and export of pharmaceuticals (or "Western medicines") and health care products, including vitamin C.

II. The Regulation of the Vitamin C Export Industry in China

A. The Nature and Regulatory Role of the Chamber of Commerce of Medicines and Health Products Importers & Exporters

As an initial matter, the allegations of the Complaint rest on a fundamental misunderstanding concerning the nature of the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber") and its role in the vitamin C industry in China. The Complaint characterizes the Chamber as a mere "trade association" that has facilitated the collusive actions of a "cartel." Compl. ¶ 43. In fact, the Chamber is vastly different from a U.S. trade association, or private Chamber of Commerce. Rather, it is an entity under the Ministry's direct and active supervision that plays a central role in regulating China's vitamin C industry. What the Complaint describes as a "cartel,"[8] and an "ongoing combination and conspiracy to suppress competition" through price-fixing (Compl.

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8. In their Complaint, and before Magistrate Judge Orenstein, plaintiffs sound a simplistic but very misleading theme: defendants here have "stepped into the shoes" of a defunct cartel of European and Japanese vitamin manufacturers, many of whom pleaded guilty to criminal price fixing charges. Hr'g Tr. 48:2-3, May 3, 2006. This theme is a blatant attempt to "poison the well" before the Court has an opportunity to understand the fundamentally different conditions under which the Chinese vitamin C export industry operated from its European and Japanese counterparts. Other than that both industries involved vitamin C, the circumstances of how those industries priced their export products could not have been more different.

¶¶ 43-44), is a regulatory pricing regime mandated by the government of China— a regime instituted to ensure orderly markets during China's transition to a market-driven economy and to promote, in this transitional period, the profitability of the industry through coordination of pricing and control of export volumes. Most importantly, this regime was established to safeguard the national interests of China.[9]

The United States has never had a state-run command economy with state-owned industries. In the years following the Civil War, chambers of commerce and other trade associations sprang up voluntarily throughout the country as a means of gathering and providing information to members of particular industries. *See Maple Flooring Mfrs. Ass'n v. U.S.*, 268 U.S. 563 (1925). The proliferation of numerous voluntary commercial and trade organizations led President Taft to note the need for a central organization in touch with such groups throughout the United States. President William Howard Taft, Third Annual Message to Congress (Dec. 5, 1911).

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9. As China carried out its economic reform beginning in 1978, namely through decentralizing Government control over, and direct management of, economic activities by permitting state-owned entities to have decision-making power and by encouraging wide private ownership in the economic sector, China was concerned about the possible effects (as it saw them) of unfettered competition between and among enterprises, including that it could retard the orderly development of a stable domestic vitamin C industry and adversely effect levels of employment in that industry. The Government attempted to temper the effects of economic reform in its regulation of domestic and foreign commerce.

This, in turn, led to the creation the following year of the U.S. Chamber of Commerce, an entirely voluntary, non-governmental organization created to, among other things, represent business interests before the federal government.

The origins and purposes of that institution stand in stark contrast to those of the similarly-named, but functionally very different, Chamber here. Prior to the advent of any free market system in China, the government itself participated in and controlled the manufacturing and exporting of goods. Only a number of state-owned national exporting entities were allowed to engage in exporting, and no private enterprises or manufacturing enterprises were allowed to export directly. These designated state-owned national exporting enterprises functioned to regulate exports under the Ministry's direction. Subsequently, however, when other types of enterprises (both private and state-owned) were allowed to obtain export licenses, the function of regulating export had to be stripped away from these state-owned national exporting entities so that they were not in the position of regulating the exports of their competitors. The Chamber was established, in part, to serve that role with respect to imports and exports of pharmaceutical products, including vitamin C; it regulates the export of those products under the authority and direction of the Ministry and the General Administration of Customs ("Customs").[10]

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10. The Chamber described its role in Chinese foreign commerce during the Relevant Period as:

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To meet the need of building the *socialist market economy* and *deepening the reform of foreign economic and trade management system*, the China Chamber of Commerce of Medicines & Health Products Importers & Exporters was established in May 1989 in an effort to boost the sound development of foreign trade in medicinal products. As a social body formed along business lines and enjoying the status of legal person, the Chamber is composed of economic entities registered in the People's Republic of China dealing in medicinal items as authorized by the departments under the [S]tate Council responsible for foreign economic relations and trade as well as organizations empowered by them. *It is designated to coordinate import and export business in Chinese and Western medicines* and provide service for its member enterprises. Its over 1100 members are scattered all over China. The Chamber abides by the state laws and administrative statutes, *implements its policies and regulations governing foreign trade, accepts the guidance and supervision of the responsible departments under the States Council. The very purpose is to coordinate and supervise the import and export operations in this business, to maintain business order and protect fair competition, to safeguard the legitimate rights and interests of the state, the trade and the members and to promote the sound development of foreign trade in medicinal items.*

China Chamber of Commerce of Medicines & Health Products Importers & Exporters, Publication of Administration and Regulation (2003), at 3 (emphasis added), Mitnick Decl., Ex. C.

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Although the Chamber is denominated a "social organization," this term also has a very different meaning under Chinese law than it has in the United States. The Chinese notion of a "social organization" includes within its scope the various "chambers" that exist under Chinese law for the purpose, when authorized, of regulating specific industries (*e.g.*, the Chamber regulates certain pharmaceutical industries, including the vitamin C industry).[11] *See* the Ministry's implementing regulation for the administration of "social organizations" (including "chambers") in foreign trade, Measures for Administration

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This document, along with all Ministry rules or regulations cited herein and attached to the Mitnick Declaration, have been authenticated under the procedures of Federal Rule of Evidence 902(3), which governs self-authentication of foreign public documents. First, an authorized official of the Ministry or the Chamber, as applicable, attested in the presence of a P.R.C. notary public to the authenticity of each document. (In the case of the Chamber, the attestation was also in the presence of a Ministry official who further authenticated the Chamber attestation.) Next, the attestation was further certified by the Consular Department of the P.R.C. Ministry of Foreign Affairs and the U.S. Embassy in Beijing. *See* Mitnick Decl., document index, for a summary of the attestation(s) and certification(s) applicable to each such document. Translations of all Chinese language documents attached to the Mitnick Declaration are certified by a qualified translation agency and further notarized by a P.R.C. notary public.

11. "Chambers [defined as 'chambers of commerce of importers and exports'] are social organizations." Notice of [Ministry] Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Sept. 23, 1994) ("Notice Regarding Chamber Personnel Management") at 1, Mitnick Decl., Ex. E.

over Foreign Trade and Economic Social Organizations (February 26, 1991) Arts. 2 and 14 ("Measures for Administration"), Mitnick Decl., Ex. D (emphasis added) ("Social organizations established with *coordination and industry regulation functions as authorized by [the Ministry]* must implement the administrative rules and regulations relating to foreign trade and economy."). As discussed, *infra*, regulation over export pricing and output levels was a specific vitamin C "industry regulation function" delegated by the Ministry to the Chamber.

The Ministry's authority over the Chamber is plenary: covering such aspects as the Chamber's selection of its leaders, its personnel management system, its budget and accounting systems and its salary structure. *Id.* Art. 16. *See also*, Notice Regarding Chamber Personnel Management, Annex II, 4 (Ministry shall verify and approve Chamber's authorized number of personnel); Annex III, 8 (Chamber's general working staff "shall be chosen primarily from the employees in service of their membership organizations or the competent authorities in charge of foreign trade and economics and the public institutions directly under their leadership"); Annex IV, 13 (candidates for senior positions within the Chamber "are recommended by [the Ministry] or recommended by over 1/3 of the [C]hamber's member companies and approved by [the Ministry]"); and Annex V, 17 (Ministry shall "verify and approve the total amount of salary of the [C]hamber"). The Chamber, in turn, must submit to the Ministry its "annual working plan and arrangements of major events," including all "important meetings and activities." Measures for Administration, Art. 21. Similarly, the Chamber "must implement the

administrative rules and regulations relating to foreign trade and economy." *Id.* Art. 14. In short, the Chamber is the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China.

B. The Vitamin C Sub-Committee

Throughout the Relevant Period, the Chamber exercised its regulatory authority with respect to vitamin C exports through its Vitamin C Sub-Committee. The Sub-Committee was established in 1997, at the Ministry's order, against a backdrop of "intense competition and challenges from the international [vitamin C) market." Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters (issued March 23, 1998), Mitnick Decl., Ex. F. The Sub-Committee, operated under the Chamber's direction and administration, is responsible for "coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce in the world market and promote the healthy development of Vitamin C export of China." *Id.* ¶ 2.

Only companies that exported vitamin C in certain specified volumes were eligible to be members of the Sub-Committee. Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters (October 11, 1997) Art. 11 ("Vitamin C Sub-Committee Charter"), Mitnick Decl., Ex. G. Pursuant to the Vitamin C Sub-Committee

Charter, only Sub-Committee members "have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." *Id.* Art. 12. With this right come a series of "obligations," including the duty to "comply with the ... regulations of the Vitamin C Sub-Committee and implement [its] resolution," and to export and supply vitamin C "only to those foreign trade enterprises verified by the Sub-Committee." *Id.* Art. 15(1)&(2). Most significantly for purposes of this case, members are obligated to *"[s]trictly execute export coordinated price set by the Chamber and keep it confidential."* *Id.* Art. 15(6) (emphasis added). The Charter further provides that any "failure to implement any resolution or regulation of the Sub-Committee and failure to perform any member's obligation shall be punished by the Sub-Committee." *Id.* Art. 16. Authorized punishments include "warning, open criticism and even revocation of ... membership," and imposition of monetary penalties. *Id.* In addition, the Sub-Committee may recommend, through the Chamber, that the Ministry "suspend and even cancel the Vitamin C export right of such violating member," *id.*, resulting in a total ban on participation in exporting altogether.

1. Initial Regulations Mandating Coordination (So-Called "Voluntary Self-Restraint") in Establishing Export Price and Quantity

Shortly after it mandated the establishment of the Vitamin C Sub-Committee, the Ministry, acting in conjunction with the State Drug Administration, promulgated a new regulation authorizing and requiring

the Chamber and Sub-Committee to limit the production of vitamin C for export and to set export prices. Notice Relating to Strengthening the Administration of Vitamin C Production and Export ("1997 Ministry & SDA Notice"), Mitnick Decl., Ex. H. The regulation limited participation in the vitamin C export industry to those companies qualified to be members of the Sub-Committee, then required all such eligible entities to "participate in such [Sub-Committee] and subject themselves to the coordination of the [Sub-Committee]." *Id.* at 2. The Sub-Committee, in turn, was required to *"formulate and adjust [the] export coordination price, which the Vitamin C export enterprises must strictly implement."* *Id.* (emphasis added).

Under this regulation, qualified vitamin C manufacturers and import and export companies were able to receive a Vitamin C export quota license. The issuance of Vitamin C export licenses was subject to two criteria. First, the export volume was required to be in compliance with the export quota. Second, the export price was required to be no lower than the price established by the Vitamin C Subcommittee's coordinated price agreements. *See id.* ("The organizations that [are] authorized by [the Ministry] to issue export licenses [were to] strictly verify the qualification of Vitamin C export and operation of the enterprises, and verify their export contracts and issue export license according to the Vitamin C coordinated price and volume quotas."). In addition, the volume to be exported by each qualified entity under this "Production and Export Licensing System" was determined by the Ministry, in conjunction

with the State Drug Administration and "relevant departments." *Id.* at 1-2. Attempts to circumvent the verification process were subject to penalties, including a reduction in an entity's export quota or the revocation of its exporting license. *Id.* para. 7 ("Vitamin C Export Coordination Group shall timely organize meetings for the major Vitamin C export enterprises ... to ... formulate and adjust export coordination price, which the Vitamin C export enterprises must strictly implement in accordance with. With respect to enterprises competing at low price and reducing price through any disguised means, a penalty shall be imposed ....") and para. 10 (" ... penalties [for violating provisions of Paragraph 7] shall be ... the Vitamin C export quota may be reduced, in the worst case their Vitamin C export right shall be revoked").

As the foregoing makes clear, price "coordination" within this regulatory system does not mean that prices are established independently or, even, by "voluntary" agreement among manufacturers, as that term is normally understood in the West. Rather, the decisions to limit the volume of exports and to set export prices were made by the Ministry. The Ministry chose to implement these policies by limiting vitamin C exporting rights to certain qualified entities, compelling those entities to participate in a subcommittee of a Ministry-approved and supervised regulatory body, and requiring that subcommittee to set export prices that exporters were then required to implement, subject to a verification system that included severe penalties for non-compliance. Within this system, therefore, "coordination" refers to the government mandated multilateral process in which

prices were set—as opposed to a unilateral process in which the Ministry alone set prices. (Indeed, the Sub-Committee was originally designated the "Vitamin C *Coordination* Group," and was referred to by that name in the 1997 Ministry & SDA Notice. see id. at 2.) The industry participants in this multilateral process, thus, acted pursuant to governmental compulsion; when establishing price controls, they were exercising governmental regulatory power; and the price controls developed through this multilateral process were legally binding and governmentally-enforced.[12]

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12. Plaintiffs rely heavily on a document from the Chamber's website that states:

> In December 2001, through efforts by the Vitamin C Chapter of the China Chamber of Commerce of Medicines and Health Products Importers and Exporters, the manufacturers were able to successfully reach a *self-restraint agreement*, whereby they would *voluntarily* control the quantity and pace of exports, so as to achieve the goal of stabilizing and raising export prices.

Letter from William Isaacson and Alana Rutherford to Honorable James Orenstein (May 12, 2006) at 3 and Exhibit C (emphasis added); *see also* Hr'g Tr. 47-48, May 3, 2006; Pretrial Order (JO), May 4, 2006, 2-3. In the context of the Ministry's regulation of the vitamin C industry through the Chamber, however, the characterizations by the Chamber of the conduct as "self-restraint" and "voluntary" are unremarkable. The vitamin C industry was under a direct Ministry order to reach a "coordinated" agreement in order to stabilize export pricing. Thus, it is understandable that the Chamber would express its pleasure publicly that the parties were able to comply with the Ministry's order to coordinate pricing and quantities on their own (*i.e.*, "voluntarily" and in "self-restraint") as opposed to requiring more direct Ministerial

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This system of Ministry-mandated and Chamber-administered "coordination" was adopted to forestall potential market disorders that might have limited the development of a healthy vitamin C export industry during China's transition from a command economy to a market-driven economy. *See* Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-Than-Normal Price (March 20, 1996), Mitnick Decl., Ex. I (explaining that the Ministry promulgated interim regulations to "ensure orderly development of the country's export trade, safeguard the legitimate rights and interests of the State and enterprises and prevent conduct of exporting at lower-than-normal price"). A system of government-mandated "coordination" among industry participants served the Ministry's goal of transitioning to a healthy market-based economy: it established mandatory coordinated export price and output levels (thereby forestalling what the government feared could be destructive export competition before the foundation for a healthy industry could be laid) by vitamin C manufacturers, although the Ministry itself did not decide what specific prices should be. Instead, this governmental function was delegated to market participants and the Chamber, in their capacities as Vitamin C Sub-Committee members, acting in a coordinated fashion.

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intervention to reach that result. Indeed, as discussed in Point II.B.2., *infra*, this regulatory system was expressly enacted "to promote [among other things] industry self-discipline."

2. Revised Regulation of Export Pricing and Quantity: Verification and Chop

In 2002, the Ministry changed the way in which compliance with the Chamber's "coordination" was confirmed by abolishing the Export Licensing System and establishing a so-called "verification and chop" system. *See* Notice Issued by the Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs for the Adjustment of the Catalogue of Export Products Subject to Price Review by the Customs ("2002 Ministry & Customs Notice"), Mitnick Decl., Ex. J. The Ministry adopted this new system "in order to accommodate the new situations since China's entry into WTO, maintain the *order* of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, *promote industry self-discipline* and facilitate the healthy development of exports." *Id.* at 1, Preamble (emphasis added). The Ministry explained that this new system would be both "convenient for exporters while it is conducive for the Chambers to coordinate export price and industry self-discipline." *Id.* at 2, para. 4. The basis of the new system was a process of *"industry-wide negotiated prices." Id.* at 2, para. 3 (emphasis added).

Under this system, the Chamber reported the "coordinated," or "industry-wide negotiated," prices for vitamin C exports to Customs. *Id.* Manufacturers were required to submit documentation to the Chamber which indicated both the amount and price of vitamin C to be exported. The Chamber "verified," *i.e.*, approved,

the contract price and volume. If the price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed a special seal, known as a "chop," on the contract and returned it to the manufacturer. Upon export, the contract was reviewed by Customs and allowed to go through only if the contract bore the Chamber's "chop." *Id.* The penalty for violating the system was draconian: withholding of the Chamber's "chop" meant complete denial by Customs of the ability to export.

In 2003, the "verification and chop" system was continued with respect to several commodities industries, including the vitamin C industry. Vitamin C exporters were required to submit contracts to the Chamber, which "verified" the exporters' submissions *"based on the industry agreements* and in accordance with the relevant regulations promulgated by the Ministry of Commerce ... and the General Administration of Customs." Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (November 29, 2003) (Exhibit 2, para. C) (emphasis added), Mitnick Decl., Ex. K. "Enterprises exporting by forging the [Verification & Chop] on the contracts will be punished by the Customs and Chambers of Commerce according to relevant rules." *Id.* at 1. Through its 2003 announcement, in conjunction with the General Administration of Customs, the Ministry extended this system throughout the Relevant Period.

Appendix E

ARGUMENT

I. Dismissal Is Mandated By The Foreign Sovereign Compulsion Doctrine

"Under the foreign sovereign compulsion doctrine the courts will immunize private defendants from antitrust liability for conduct that is actually compelled, not merely permitted by a foreign sovereign acting within its jurisdiction. In that case, the acts of the private party 'become effectively acts of the sovereign.'" P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 274c at 406-07 (2d ed. 2000), *quoting Interamerican Refining Corp. v. Texaco Maracaibo. Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1980) (other citations omitted).[13]

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13. In their Antitrust Enforcement Guidelines for International Operations, the U.S. Department of Justice and the Federal Trade Commission provide the following illustration of conduct that they acknowledge cannot be challenged under U.S. antitrust law:

> Assume for the purpose of this example that the overseas production cutbacks have the necessary effects on U.S. commerce to support jurisdiction. As for the participants from the two countries that did not impose any penalty for a failure to reduce production, the Agencies would not find that sovereign compulsion precluded prosecution of this agreement. As for participants from the country that did compel production cut-backs through the imposition of severe penalties, the Agencies would acknowledge a defense of sovereign compulsion.
>
> Greatly increased quantities of commodity X have flooded into the world market over the last two

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U.S. courts, including the Second Circuit, have recognized that they lack subject matter jurisdiction over antitrust actions that challenge private conduct that is compelled by a foreign government. *Certified O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987) *cert. denied* 488 U.S. 923, (1988); *Mannington Mills, Inc. v. Congoleum Com.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America, N.T. and S.A*, 549 F.2d 597, 606-07 (9th Cir. 1976); *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Prod. Holdings (North America), Inc.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1080 (S.D.N.Y. 1988); *cf. Interamerican*, 307 F. Supp. at 1296-98 (granting summary judgment on the merits based on the defense).

> or three years, including substantial amounts indirectly coming into the United States. Because they are unsure whether they would prevail in an antidumping and countervailing duty case, U.S. industry participants have refrained from filing trade law petitions. The officials of three foreign countries meet with their respective domestic firms and urge them to "rationalize" production by cooperatively cutting back. Going one step further, one of the interested governments orders cutbacks from its firms, subject to substantial penalties for non-compliance. Producers from the other two countries agree among themselves to institute comparable cutbacks, but their governments do not require them to do so.

Antitrust Enforcement Guidelines for International Operations, issued by the U.S. Department of Justice and the Federal Trade Commission (April, 2005), Illustrative Example K, Section 3.32.

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The foreign sovereign compulsion doctrine is "[a] corollary to the act of state doctrine"; it recognizes "that corporate conduct which is compelled by a foreign sovereign is ... protected from antitrust liability, as if it were an act of the state itself." *Timberlane*, 549 F.2d at 606. "When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims under the antitrust laws are dismissed" for lack of subject matter jurisdiction. *O.N.E. Shipping*, 830 F.2d at 453 (affirming jurisdictional dismissal based on the defense); see also *McElderry*, 678 F. Supp. at 1 080 (same). The doctrine is applicable where "the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." *Mannington Mills*, 595 F.2d at 1293.

The foreign sovereign compulsion doctrine is fully applicable — and dispositive — here. Chinese law, promulgated by the Ministry and administered through the Chamber, compelled defendants, as members of the Vitamin C Sub-Committee, to coordinate export prices and maximum export volumes and to abide by those requirements. Under the Ministry's regulations, defendants were compelled to become participating members of the Vitamin C Sub-Committee, 1997 Ministry & SDA Notice at 2 Ex. H, and Vitamin C Sub-Committee Charter, Art. 12, Ex. G, they were compelled to *"formulate and adjust [the] export coordination price,"* 1997 Ministry & SDA Notice at 2 (emphasis added), Ex. H, and they were compelled to abide by and implement that "coordinated" price, *id.*, and Vitamin C Sub-

Committee Charter, Art. 15(6), Ex. G. Defendants would not have been eligible to export vitamin C at all if they failed to participate in these price-setting and production-limiting activities. 1997 Ministry & SDA Notice, Ex. H; Vitamin C Sub-Committee Charter, Art. 12, Ex. G. Government entities policed defendants' compliance with the resulting prices and volume limits, and non-compliance would subject defendants to severe penalties, including, among other things, reduction in export quotas (resulting in further economic loss), and, possibly, loss of export rights. 1997 Ministry & SDA Notice at 2, Ex. H; Vitamin C Sub-Committee Charter, Art. 16, Ex. G; 2002 Ministry & Customs Notice at 2, Ex. J.

As noted above, while China is in the process of moving actively from its former state-run command economy to a market economy more of a type familiar to the United States, the current economic system is transitional and there remains a level of active state direction and coordination that has no analogue in the United States. Thus, for example, one would not find in the United States a government mandate to "maintain order in market competition," to "promote industry self-discipline," or to mandate export pricing and output levels "based on the *industry agreements*"; nor would one find a governmentally-directed organization, such as the Chamber, directing parties to attend meetings, such as those referred to in the complaints, to discuss prices or export quotas, with a view to maximizing industry profitability in export commerce.

That, however, is precisely the transitional framework under which the vitamin C industry functioned throughout

the Relevant Period. Thus, while the Government did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination.* That, of course, is all that is alleged in the complaints here and that is conduct that was compelled by the Chinese government in the interests of insuring "order in market competition."

It is thus clear that these mandates of Chinese law were "basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." *Mannington Mills,* 595 F.2d at 1293. The central allegations of the Complaint are that defendants "agreed to control export quantities and achieve stable and enhanced price goals," and that plaintiffs were injured because the price of vitamin C products "has been fixed, raised, maintained and stabilized at artificial and non-competitive levels." Compl. ¶¶ 43 and 62. The decision to control export quantities and require coordinated export prices was made by the Ministry. Defendants were compelled to implement these decisions through participation in the Vitamin C Sub-Committee. Similarly, the Complaint alleges that the allegedly unlawful prices and production limits were established through defendants' "participat[ion] in meetings and conversations in China and elsewhere in which the prices, volume of sales and exports to the United States, and markets for vitamins were discussed and agreed upon." Compl. ¶ 46. Again, contrary to the allegations of the complaint, defendants were compelled by the Ministry to engage in these very activities. The government-supervised Chamber facilitated and

coordinated those meetings, and was required to advise the Ministry of such meetings.

Accordingly, the price "coordination" alleged in the complaint cannot serve as a basis for the imposition of antitrust liability. Indeed, just as in *O.N.E. Shipping*, this "antitrust suit represents a direct challenge to [the Ministry's medicinal product export] laws and to the legality of [defendants'] agreements under those laws." 830 F.2d at 451. Those "laws were designed to promote the development of a strong [Chinese medicinal products industry] and to assist [China's] economic development." *Id.* Accordingly, here, as in *O.N.E. Shipping*, "the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the [Ministry]." *Id.* at 453. *See also Trugman-Nash, Inc.*, 954 F. Supp. at 736 (New Zealand dairy producers entitled to defense of foreign sovereign compulsion where New Zealand law required export licensing board to disapprove "of sales price competition among New Zealand dairy producers in respect of exports to nations like the United States that restrict import quantities")[14]

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14. The arguments of the United States in its amicus brief in *Matsushita* (*see* footnote 4, *supra*) apply here with equal force:

> [T]he court of appeals should have given dispositive weight to the statement submitted to the district court by the Japanese Government, which indicated explicitly that part of petitioners' conduct was compelled. The court's rejection of petitioners' sovereign compulsion defense has caused deep concern to the Government of Japan and to the governments of other countries that

Finally, this case stands in stark contrast to those where courts have deemed the foreign sovereign compulsion doctrine inapplicable. For example, in *Continental Ore Co. v. Union Carbide and Carbon Com.*, 370 U.S. 690 (1962), the Court held that the defense was not available to a Canadian entity that was given the exclusive right to import vanadium oxide into Canada, but then decided, "within its area of discretionary powers," to use that right to conspire with a U.S. subsidiary to boycott and destroy a competitor. *Id.* at 706-07. The Supreme Court emphasized that there was "no indication that [any] official within the ... Canadian government approved or would have approved of" this conduct, and that no "law in any way compelled discriminatory purchasing." *Id.* Here, the Ministry not only approved defendants' conduct

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are significant trading partners of the United States and threatens to affect adversely the foreign policy of the United States. Mitnick Decl., Ex. B at 6.

The court of appeals erred in rejecting petitioners' sovereign compulsion defense. The Government of Japan explained in the MITI [Ministry of International Trade] Statement that it "directed" petitioners "to enter into" the check price agreement.... [T]hat explicit and detailed statement by a foreign sovereign that it mandated the check price agreement in accordance with its laws ... should have been given dispositive weight. It follows that the foreign sovereign compulsion defense precluded use of the check price agreement as a basis for liability under the Sherman Act. *Id.* at 12.

The MITI Statement also explained that MITI had directed the regulations [through] the Japan Machinery Exporters Association .... *Id.*

in establishing export limits and price coordination, it compelled that very conduct.

Similarly, plaintiffs do not-and cannot—allege that defendants entered into a price—fixing conspiracy, then worked to secure laws or regulations that blessed their arrangements. *Cf. U.S. v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (conspiracy formed in the United States for the purpose of monopolizing sales to the United States was not immunized simply because one element of the conspiracy involved securing laws that recognized the conspirators as exclusive traders and imposed discriminatory sales taxes on rivals). Here, the Ministry imposed the relevant laws on defendants. Indeed, the impetus for these and other price coordination measures was not to endorse existing price-fixing conspiracies, but to prevent disorderly competition.

In sum, Chinese Law mandated the participation of entities engaged in vitamin C export to coordinate with respect to export pricing and volume quotas and to adhere to such limits. Each defendant conducted itself as Chinese law required when it participated in Sub-Committee meetings at which agreements were reached with respect to pricing and volume controls. Refusal to subject oneself to the coordination of the Sub-Committee and the Chamber is unlawful under relevant regulations and would result in severe punishment, either through monetary penalty or loss of ability to participate in the industry altogether. Because all of the elements of the foreign sovereign compulsion doctrine are satisfied, this lawsuit should therefore be dismissed.

II. The Act of State Doctrine Also Mandates Dismissal

The act of state doctrine also forbids judicial inquiry into China's motives in regulating its foreign commerce. The act of state doctrine differs from the foreign sovereign compulsion defense in that the act of state doctrine is grounded in principles of federalism and reflects the view that the courts, in deciding whether to accord recognition to certain foreign acts of state, might hinder the conduct of foreign affairs by the Executive Branch. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990). The Supreme Court has acknowledged "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). *See also Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434,448-49 (1979) and *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative— 'the political'— departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

The act of state doctrine, in essence, is "designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government. Such an inquiry is foreclosed under the act of state doctrine." *O.N.E.*

Shipping, 830 F.2d at 452 (*citing Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984, 98 S.Ct. 508 (1977)). *See also W.S. Kirkpatrick*, 493 U.S. at 404.

The burden of proving an act of state rests on the party asserting the applicability of the doctrine. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 684-85, (1976), *cert. denied, Saksand Company v. Republic of Cuba*, 425 U.S. 991 (1976). "[T]his burden requires that a party offer some evidence that the government acted in its sovereign capacity and some indication of the depth and nature of the government's interest." *Liu v. Republic of China*, 892 F.2d. 1419, 1432 (9th Cir. 1989) (*citing Timberlane*, 549 F.2d at 607-08).

The act of state doctrine mandates that this Court decline to exercise jurisdiction over this action. As set forth above, the conduct alleged to have been violative here was compelled by the Chinese government. The Chinese government compelled such conduct in its oversight of its foreign trade regulation. Any determination by this Court into the conduct as alleged by the plaintiffs will necessarily invoke an inquiry into the legitimacy of China's foreign policy concerning the manufacture and export of vitamin C. To permit the validity of the policymaking decisions of China "to be reexamined and perhaps condemned by [this] court[] would very certain[ly] 'imperil the amicable relations between [the two) governments and vex the peace of nations." *Oetjen*, 246 U.S. at 304. It cannot be denied that the possibility of insult to China is significant — "the granting of any relief would in effect amount to an order from a domestic

court instructing a foreign sovereign to alter its chosen means" of regulating domestic conduct. *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) *cert. denied*, 454 U.S. 1163 (1982). Such an inquiry is prohibited by the act of state doctrine — if China's regulation of its foreign policy implicates U.S. interests as alleged, then the proper forum for such discussions between the United States and China is not in this Court.

III. This Suit Should Be Dismissed Based on Principles of International Comity

Principles of international comity also render the exercise of jurisdiction over the Complaint inappropriate. Comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

O.N.E. Shipping, 830 F.2d at 451 n.3 (*quoting Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). The Second Circuit has adopted the multi-factor test set forth in *Timberlane* for determining when comity principles require courts to decline to exercise jurisdiction over the conduct of foreign actors. *See U.S. v. Javino*, 960 F.2d 1137, 1142-43 (2d Cir. 1992) *cert. denied, Javino v. U.S.*, 506 U.S. 979 (1992);

O.N.E. Shipping, 830 F.2d at 451. Here, virtually all of these factors militate in favor of dismissal.

First, for all of the reasons discussed above, there is an irreconcilable conflict between the requirements of U.S. antitrust law and the laws and policies of China. *See Timberlane*, 549 F.2d at 614 (courts must examine "the degree of conflict with foreign law or policy"). Simply put, Chinese law mandates conduct that U.S. antitrust law proscribes. *See Trugman-Nash, Inc.*, 954 F. Supp. at 736 (dismissing on comity grounds after finding "actual and material conflict between American antitrust law and New Zealand law in respect of the marketing of dairy export produce"); *McElderry*, 678 F. Supp. at 1079 (dismissing on comity grounds based on "direct conflict between" U.S. antitrust law and the law of the United Kingdom). And that Ministry-mandated conduct, all of which occurs in China, is far more "importan[t] to the violations charged" than any "conduct within the United States." *Timberlane*, 549 F.2d at 614.

Accordingly, an exercise of jurisdiction cannot achieve "compliance" with U.S. antitrust law: as Chinese entities with their principal places of business in China, defendants cannot export vitamin Cat all if they do not comply with the laws of China. *See id.* (courts must consider the nationality of the parties and their principal places of business and the extent to which enforcement by either state can be expected to achieve compliance). This lawsuit, therefore, cannot compel defendants to conform their future conduct to the requirements of U.S. antitrust law, because they will remain subject to the Ministry's price-coordination requirements.

Those requirements of Chinese law, moreover, were not adopted with "the explicit purpose to harm or effect American commerce," nor were any such harms or effects reasonably foreseeable. *See id.* To the contrary, the Ministry adopted these requirements to prevent self-destructive price competition during China's transition from a state-run to a market driven economy. As a consequence, the "significance of effects on the United States" is far smaller than the significance of the effects in China. *Id.* The price coordination and production limits plaintiffs challenge lie at the very heart of the Ministry's efforts to oversee and facilitate a sweeping transformation of China's entire economic system. Whatever effects defendants' compliance with the Ministry's requirements has allegedly caused in the United States, those effects plainly do not implicate an historic transformation of the U.S. economy.

Finally, and as a consequence, punishing defendants (through an award of treble damages) for their compliance with mandates that the Ministry has deemed essential for the development of a stable market-driven economy can only adversely affect relations between the United States and China. *See id.* at 609 (noting that nations "have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts"); *Mannington Mills*, 595 F.2d at 1297 (warning against a "provincial approach" to the exercise of antitrust jurisdiction over foreign conduct and noting examples of hostile reactions by British and Canadian authorities to such exercises). Insofar as China's sovereign policy decisions about how best to manage its economic transformation conflict with the policies embodied in U.S. antitrust laws, that conflict should be addressed "through

diplomatic channels," and not through "the unnecessary irritant of a private antitrust action." *O.N.E. Shipping*, 830 F.2d at 454.

CONCLUSION

For all of the foregoing reasons, this Court should decline to exercise jurisdiction and should dismiss the Complaint.

Dated:

SIDLEY AUSTIN LLP
By: /s/Joel M. Mitnick
Joel M. Mitnick (JM-0044)
Tracey R. Seraydarian (TS-5988)

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Attorneys for Amicus Curiae
The Ministry of Commerce of the People's Republic of China

APPENDIX F — EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED DECEMBER 5, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-01738 (DGT) (JO)

IN RE: VITAMIN C ANTITRUST LITIGATION,

United States Courthouse
Brooklyn, New York
Friday, December 5, 2008
2:30 p.m.

TRANSCRIPT OF CIVIL CAUSE
FOR STATUS CONFERENCE

BEFORE

THE HONORABLE DAVID G. TRAGER
UNITED STATES SENIOR DISTRICT JUDGE

AND

THE HONORABLE JAMES ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

Court Reporter: Victoria A. Torres Butler, CRR
Official Court Reporter
Telephone: (718) 613-2607
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E-mail: VButlerRPR@aol.com

[3](In open court.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Please, be seated.

Okay. Who wants to start, if anybody? Otherwise, I'll tell you what my preliminary rulings are going to be and then, you can respond.

Would you prefer that?

ALL: Yes.

THE COURT: Okay.

Preliminarily, I'm going to grant this application, the indirect plaintiffs, to stay that. I also don't intend to act on the class certification motion until the next steps are resolved.

I always find these class certification money for lawyers a waste of everyone's time. If there's a case somehow that's settled and the plaintiffs and defendants agree to make the class as big as possible, and if I throw the case out then, suddenly the defendants want the class to be as big and the plaintiffs the other way. I find that just a big waste of time.

Now, on the issue of certification, I think you're wasting your time. I'm not going to grant it unless you agree that this is the following question: Unless, basically,

the defendants concede that they voluntarily or agreed among themselves to fix the prices and then down the road realized [4]they might have a problem and sought Government approval or ratification, which I think whatever it is has been given, and then that alone would provide a defense. Otherwise, it's a question of fact. I don't think it's appropriate to certify and I doubt the Court of Appeals would take a few more.

A few more points.

I was somewhat disturbed by the statement on page five and defendants' statements, I guess, filed by attorney for defendant Northeast, Greenberg Traurig. This defendant's statement in advance, a bunch of you have signed it. Yes, I guess all of you. I don't know.

On page five is the following statement, the paragraph at the top: "The parties should discuss the nature of further proceedings that the Court contemplates in order to address and resolve the issues that is identified in its opinion regarding the Government defenses, particularly in light of the fact that such issues relate to the truth of the representations of the People's Republic of China."

Now, I found that statement rather disturbing because I never challenge the truth. I know what the position of the Republic of China as represented in an amicus brief is, but as I as far as I know, there has been no affidavit. No Government official has come forward with knowledge of the facts to tell us exactly happened from the Government's point of view. As far as I can see, the sole

reliance is on the [5]so-called charter from The Chamber, which allowed them to fix prices or agree on prices from 1991, but suddenly nobody did that until 2001 when they were in a position to do it.

So, the issue, as far as I'm concerned, is I'm in no way attacking the truth, as you put it. I mean, that's the position of the Republic of China and I really do not appreciate, considering the importance of the case and the importance to the Republic of China, that kind of statement.

And the next one, even the next statement where it says: "Would not expect the People's Republic of China to be subject to discovery or a certiorari to be required to appear in this court to provide testimony."

Now, I may have said that, but that doesn't change the fact that this is an affirmative defense and the burden is on the defendant. So, I don't know how they're proposing to meet that defense without somebody from the Republic of China who knows something about this.

Okay. I have a few other comments since I've spent a lot of time on this.

I'm not sure what the relevance of the expert testimony is, if we're still dealing with what the Germans would call the grundfesten, the basic facts about what happened here, the question of whether it was authorized or not, that's a nice question of law, but until we resolve that basic fact, I'm not sure what the relevance is, but I just [6]would ask you to keep that in mind.

Now, what I think should be done next, I'll try to simplify this. You complete this discovery and then whatever is left and you file motions for summary judgment. And at that point, I'll make a ruling whether there's a question of fact. Or if I throw the case out, well, that will end it.

Anybody have any questions?

(No response.)

THE COURT: Comments?

MR. BOMSE: Yes, Your Honor. If I may?

THE COURT: Yes.

MR. BOMSE: Stephen Bomse, I represent the defendant Jiangsu Jiangshan.

THE COURT: Yes. You're not yet served; is that the other --

MR. BOMSE: No. No.

THE COURT: Okay.

MR. BOMSE: No, I was going to comment on Your Honor's comments.

THE COURT: Okay.

MR. BOMSE: I'm not going to, of course, try to persuade Your Honor to change his mind with respect to certification. And certainly, as far as we're concerned, we would not agree that that is the appropriate question to be certified.

[7]We've suggested what we thought those were and Your Honor has indicated that you're not --

THE COURT: You're wasting your time. Okay.

MR. BOMSE: So.

THE COURT: Saving your clients a lot of money.

MR. BOMSE: Well --

THE COURT: Okay.

MR. BOMSE: -- we are going to do that.

THE COURT: All right.

MR. BOMSE: We are, we are eager to do that, of course, and we really do think that the question is: How do we get to resolution of what we've called the Government defenses, which are the central issue in the case because I don't think there really are disputes of fact in the sense of plaintiff's say X happened and we say Y happened.

You have in front of you not only pleadings, but documents, some of which you referred to. And those

documents, leaving aside questions that might arise as evidentiary matters, we assume would be before you. The question is, is what is the legal significance of that?

And our view, and I think we differ respectfully with Your Honor on this, is that have what you do have before you are statements of the Government of China, which represent its official statement.

THE COURT: Its position.

[8]MR. BOMSE: Yes.

THE COURT: But you referred to it, and it really annoyed me, is that I was questioning the truth of their representation. I know what their position is, but this has nothing to do with truth. I know that this is their position.

MR. BOMSE: Well --

THE COURT: The implication of this statement is that I was questioning their position. I know what their position is.

MR. BOMSE: Well, then.

THE COURT: But nobody there has said that, in fact, that, you know, that provided either an affidavit or a legal brief -- not a brief -- a basis for that statement.

I understand what their position is, but I don't know how you're going to meet the affirmative defense unless

you offer something more, other than the statement that they authorized it.

MR. BOMSE: Well, it is our view that the brief that they submitted constitutes a statement of the law. It is presented in the way that such matters are presented to courts when a foreign government wishes to make its views known as the Chinese Government did here.

And in fact, I think the law -- well, I don't want to talk about the law -- but that is my understanding as to the standard procedure for a foreign government to make its [9]views officially --

THE COURT: Its views. Fine.

MR. BOMSE: But when I use the term "views," it is, in effect, an evidentiary statement. Not in the sense that if a witness were there --

THE COURT: I may be wrong. I don't want to waste a lot of time. If you can find some authority for that.

My recollection of some of these other cases involving where the compulsory action governments take positions about what the view is, you know, they make a complete record on it. You know, not just their quote, statement. Like in the, I think, the Australian case. The Government there made very clear what the laws were and what their position were and how there was no question.

Here we have a serious question being raised about whether, in fact, the Government was at all involved in this. And then, you're left with this whole position that, you know, the fact that this committee exists, that makes it legal. And that's all that's required.

And if you want to rest on that, fine.

MR. BOMSE: Well, Your Honor, again --

THE COURT: All right. There's no point, okay? I spent a lot of time on the motion to dismiss. I'm not certifying the question and you'll have to figure out what posture you want to take.

[10]Also, I have to tell you, it's a little bit disturbing that, you know, I haven't been involved in the discovery, but an amicus curiae; it's one thing to present their position, but I remember in one of these instances there was a discovery issue in which one of the parties, I forgot already the circumstances, appealed.

And suddenly you, I assume you represent the Chinese Government.

MR. BOMSE: I do not, Your Honor.

THE COURT: They do (indicating).

They, too, took an appeal. And I thought you're an amicus curiae.

MR. MITNICK: Joel Mitnick, Sidley Austin, on behalf Of the Ministry of Commerce.

We have not taken an appeal.

MAGISTRATE JUDGE ORENSTEIN: No, no, no. I think what Judge Trager's referring to and please, anyone correct me, it's been a while since I reviewed it also.

At the initial appearance before me when we discussed the stay of discovery, the Ministry, through Counsel, appeared as amicus and said it took no position. It had no stake in the matter.

When the defendants, disappointed by my ruling on that took an appeal, the amicus -- and Mr. Mitnick, please do correct me if I'm wrong -- the amicus weighed in not taking an [11]appeal, but weighed in on the defendants' side on the same position that it said it had no view on when it was before me.

MR. MITNICK: I understand, Judge Orenstein, what you're referring to now.

At the very -- if I may explain?

THE COURT: Yes.

MR. MITNICK: At the very first hearing in this matter that the Ministry attended -- it may have been the first hearing, it was certainly the first one the Ministry attended, it was before Judge Orenstein -- the Ministry

had not yet appeared before Your Honor and had not yet submitted an amicus brief. In fact, had not yet received permission to file an amicus brief.

At that hearing, we were appearing, I was authorized to appear simply to explain that the Government of China considered this a sufficiently important case that it was going to seek leave to file an amicus brief.

I was then asked if the Government of China had a view on whether there should be a discovery stay. And I said it did not, which it did not at that point. The Government did not want to get involved in anything procedural. It wanted to get involved in the amicus brief.

Subsequently, there came a time after the Government put in its amicus brief where it reconsidered its decision. And Judge Orenstein asked if there was any fact that had [12]changed in the interim. And I believe my response was there was no fact that changed, other than the Government believed its posture in the case was different having now put its official statement before the Court. And it felt, as a foreign sovereign, that having put its official statements before the Court, it would be appropriate to resolve that issue before putting its citizens to a burden of discovery.

But that is the only extent to which we've been involved in an appeal of anything by the defendants. The Government has tried to stay out of procedural issues in the case.

THE COURT: Okay.

MAGISTRATE JUDGE ORENSTEIN: May I just follow up?

THE COURT: Yes.

MR. MITNICK: Forgive me if this goes a little off-track.

MAGISTRATE JUDGE ORENSTEIN: Just so I understand the Ministry's position.

When you first sought leave to appear as amicus, you essentially said -- and I'm paraphrasing, so please correct me -- that you were essentially neutral on the issues before me and were appearing as a friend of the court.

And then, I later found out, and this came up at a hearing that for reasons sufficient to yourself you did not attend, that even before that point, you had -- your client, [13]rather -- had attended at least or even organized a joint defense meeting, which I thought was somewhat inconsistent with the representation that had been made earlier.

Am I missing something?

MR. MITNICK: I think that you are, with all due respect. And I would agree with you that it would be inconsistent.

I don't believe at that first hearing, and I should say I've gone back to look at the transcript, I don't believe that

I made any representation that the Ministry was neutral. The Ministry was appearing in the typical friend-of-the-court fashion.

What I indicated I believe -- I thought clearly, and I apologize to the extent it evidently wasn't clear -- is that the Ministry was appearing in this case in the form of an amicus curiae solely because that is the basis on which a foreign government --

THE COURT: Okay.

MR. MITNICK: -- has been directed by The State Department to appear. But that our purpose in appearing was as a government supporting companies within its government that were complying with the rules that it had promulgated. And therefore, it had a very strong interest aligned with the defendants in the case.

And I believe I specifically said it had two [14]interests. One interest was aligned with the defendants, which was to resolve this particular case with these defendants in a way that demonstrated that they were simply following their government's orders.

And then, secondly, it had an independent interest, which was beyond this case because it was patently obvious at that time that Counsel for the plaintiffs in this case were already involved in bringing additional antitrust cases against other industries.

And so, there was an antitrust principle that the government was interested in establishing that was independent of the defendants' interests in this case. But I went out of my way to indicate that there were two interests.

I also did one other thing that I thought was, that was intended to make the point of alignment, which is that if Your Honor may remember, I specifically sat behind the bar until the defendants sat down, the proceedings began and I had asked Mr. Bomse to please ask the Court if I could join the defendants at the Counsel table, which I had intended as a visual and physical indication of alignment with interest.

To the extent that the amicus brief didn't convey that joint interest, I certainly apologize. It was certainly intended to.

MAGISTRATE JUDGE ORENSTEIN: Okay.

Is there a joint defense agreement among the [15] defendants?

MR. MITNICK: Yes.

MR. LABATINE: Yes, Your Honor.

MR. MITNICK: Among the defendants, and the Government, and The Chamber.

THE COURT: Okay. Well, it's too early, but how do you become party to a joint defense where you're not being sued?

MR. MITNICK: Because there is, we believe there is a common legal interest in being able to vindicate the regulatory structure in which the defendants and the government are working together.

It would be impossible, I think, for the defendants to go forward in this case having, as we argue, been compelled to be involved in this case without some level of coordination with the Government.

THE COURT: Okay.

MR. MITNICK: So, at the beginning --

THE COURT: All right. I'm not dealing with that issue today. So, I want to, I'm just educating myself since you've been dealing with Magistrate Judge Orenstein most of the time and I was focusing on the motion.

All right. I think that pretty much resolves any pending issues.

* * * *

APPENDIX G — EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MARCH 5, 2013

[954]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-1738 (BMC)

IN RE:

VITAMIN C ANTITRUST LITIGATION,

Plaintiff,

-against-

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Defendants.

United States Courthouse
Brooklyn, New York

Wednesday, March 5, 2013
9:30 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT COURT JUDGE

Appendix G

Court Reporter: Mary Agnes Drury, RPR
Official Court Reporter
Telephone: (718) 613-2615
E-mail: Mad78910@yahoo.com

***

[1085](Jury is in the courtroom at 3:19 p.m.)

THE COURT: All be seated, please.

Continue, Mr. Isaacson.

CROSS-EXAMINATION (Continued)

BY MR. ISAACSON:

Q Sir, at some point you said you had various positions with the vitamin C subcommittee, I think you said it included deputy chairman or chairman?

A Yes.

Q And you were selected as chairman by a vote of the subcommittee council, isn't that right?

A Yes.

Q Now, that 1997 charter that we were looking at, that charted was adopted after a discussion and vote by the vitamin C companies and trading companies, right?

A Yes.

Q The 2002 charter was based by a vote of vitamin C companies also, right?

[1086]A Yes.

Q The 2002 charter was passed at a meeting that covered all or parts of four days, right?

A In principal in a meeting that charter was passed, and then the membership took them home and then make some corrections and then submitted it and then there were some -- there were modifications.

Q All right. At that first meeting where it was passed in principal, that was a -- that was a meeting that covered all or part of four days, right?

A Didn't need four days to pass this.

Q Okay. The binder there, sir, if you could show him Exhibit 37. The Chinese may be on the back of the document and this is a VC conference agenda that was provided in this litigation by NEPG. And there is some handwriting on the document, and so please ignore the handwriting, but with respect to the printed agenda, was that an agenda that you prepared?

A Yes.

Q All right.

MR. ISAACSON: I move to admit Exhibit 37.

MR. MASON: No objection.

THE COURT: All right. That's received without objection.

(Plaintiff Exhibit 37 was admitted into evidence.)

[1087]Q I don't know how to say this in Chinese, but you are identified as a master of ceremonies in the upper right-hand corner. Does this remind you that these -- that this charter was passed in principal as part of meetings that took place over at least parts of four different days?

A Yes.

Q All right. And then --

A Three days. Three days. The first day was reporting and, in fact, the meetings took only two days.

Q 15 companies voted for this charter, right, both large and small vitamin C companies?

A At the time by principal it was passed but it was not by vote.

Q Sir, 15 companies voted for this new charter after it was sent to them, right?

A Yes.

Q And all the vitamin C manufacturers had input on the charter at the meeting?

A Yes.

Q You testified yesterday or today that the Ministry of Commerce determines the salary level of the people who work at the Chamber, do you remember that?

A Yes.

Q All right. In fact, what happens is the Ministry of Commerce approves the total amount of all the salaries of [1088]Chamber employees, right?

A Yes.

Q The -- you testified earlier today about how you would chop contracts and you would chop them -- you would look at whether they were lower than the minimum price, and if they weren't, you would chop them by the price, right?

A Yes.

Q Can we see that one contract on the screen? This is one page from Plaintiff's Exhibit 386A, which has been admitted. Is that an example of a chop in the pricing area of a contract?

A Yes.

Q Okay. That's the chop that you would do?

A This is chop.

Q And in order to sell vitamin C in the United States, the companies would have to get the chopped contracts back from you, right?

A Yes.

Q All right. I want to show you what's been admitted as Plaintiff's Exhibit 386. And I won't ask you to read or analyze all of these, I will tell you these are Weisheng vitamin C contracts that are part of the sales to the United States that are at issue in this case. And you look for yourself, but we've been unable to find a chop on any of these contracts. Take a look for yourself.

[1089]A There's none.

Q Do you have an explanation for that?

A The company takes the chopped contract from us to report to customs, and then the customs would take away the chopped contract that we chopped. The chopped contract would never have reached the customers hands.

Q Sir, let me be clear. These are not customer contracts, these are the contracts Weisheng provided us, okay. We did not obtain these from US customers, we obtained these from -- these are Weisheng copies, all right.

Do you have any explanation as to why Weisheng would have so many contracts without chops?

A Then those did not report to the customs and exported.

Q So any contracts that Weisheng has -- that Weisheng has, not the customers, without a chop, were contracts that were not reported to customs?

A Yes.

Q This is 427. These are Hebei Welcome contracts.

THE COURT: You may approach, Mr. Isaacson.

MR. ISAACSON: Thank you.

Q Those are all contracts to the United States that were provided by Hebei Welcome, not customers. Unless we've missed something, they don't have chops. Is your testimony the same that any contracts without chops were not reported to customs?

[1090]A Correct.

Q Exhibit 52 in that binder, sir. This has previously been admitted into evidence. I'd ask you to put that on the screen, Trevor. You drafted Exhibit 52, right?

A Yes.

Q And you see, you wrote a number of times in this document that this document was discussing industry agreed export prices. Do you see that in the title?

A Yes.

Q Do you see that in the first paragraph?

A Yes.

Q Do you see where it says in item one, the agreed prices are the minimum prices?

A Yes.

Q And above the chart on the second page there is a title?

A Yes.

Q List of export prices of commodities reviewed by customs and agreed by the industry for obtaining export preauthorization stamp from the Chamber, the export preauthorization stamp, that's the chop, right?

A Yes.

Q You're the one who wrote all these times that these prices were agreed prices, right?

A Yes.

[1091]Q And you left vitamin C blank in this document because the market price at that time was much higher than $3.35, right?

A It was much higher than $3.35.

Q And you didn't want to write that down because the vitamin C companies were charging more than 3.35 and you didn't want to pull down the prices?

A Yes.

Q Now, you submitted a minimum price for vitamin C exports to customs -- I'm done with Exhibit 52. I'm sorry, I don't want to confuse you with that.

INTERPRETER: Thank you.

Q You submitted a minimum price for vitamin C exports to customs on two occasions in 2002 or after, right?

A Yes.

Q And you submitted it to customs on a computer disc. The first disc you submitted a price of $3.25, and in July of 2002 you submitted a second disc with the price of $3.35.

INTERPRETER: Repeat the first one.

Q In July of 2002 you submitted a second disc with the price of $3.35 per kilograms?

INTERPRETER: What was the first one?

MR. ISAACSON: He already answered the question.

INTERPRETER: No, I may have mistranslated it.

Q All right. I'll go back over it. The first disc you [1092] submitted had a price of $3.25?

A Yes.

Q All right. And then in July 2002 you submitted a second disc with a price of $3.35?

A Yes.

Q You only submitted two discs after 2002, I'm sorry, that had a vitamin C price?

A Yes.

Q You never submitted a disc with $9.20?

A I also gave customs $9.20. Okay. But they – the customs did not really check that, he just look at whether there is a chop or not.

Q All right. Sir, let's get this straight. You only submitted -- after 2002 you only submitted two discs to customs that had a vitamin C price?

A Two times or maybe three times, it could be three times. It could be three times.

Q All right. Sir, page 122 of the deposition, line 13 to 16. Trevor?

A Last time I said two times, I know that. You don't have to show me. The last time I did say twice.

Q The last time you did say twice. In fact, you even told me that customs stopped asking for the disc in 2003 and 2004, right?

A Yeah, because they don't examine it.

[1093]Q You never submitted a disc with $9.20, did you?

A I must have. I must have, but they don't examine it. They don't examine it.

Q That's entirely new testimony today, right?

A Yes.

Q Now, no company was -- no vitamin C company was ever punished for charging less than $3.35 per kilogram, right?

A Under $3.35. The key point is I would not have discovered it.

Q Okay. But my question is: No company was ever punished for charging less than $3.35, right?

A My Chamber never received any contract that was under $3.35. After all -- after -- from August of 2002, the Chamber never received any contract that was under $3.35.

Q I understand what you are saying about receiving contracts. My question is very simple: No company was ever punished for charging less than $3.35, right?

A Yes.

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APPENDIX H — EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MARCH 12, 2013

[1520]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-01738 (BMC)

IN RE:

VITAMIN C ANTITRUST LITIGATION,

Plaintiff,

-against-

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Defendants.

United States Courthouse
Brooklyn, New York

Tuesday, March 12, 2013
10:30 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE

Appendix H

[1521]Court Reporter: VICTORIA A. TORRES BUTLER, CRR
225 Cadman Plaza East
Brooklyn, New York 11201
VButlerRPR@aol.com

[1522](In open court.)

(Judge BRIAN M. COGAN enters the courtroom.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE COURT: Have a seat, please.

All right. How would the parties propose to proceed now?

MR. CRITCHLOW: Your Honor, defendants would propose to address Rule 50 motions first.

THE COURT: Okay.

MR. CRITCHLOW: Which is what you suggested yesterday.

THE COURT: Okay, go right ahead.

MR. PRESCOTT: Good morning, Your Honor.

In light of changes in our ranks, Mr. Critchlow and I will be sharing the speaking to the Rule 50 motions.

THE COURT: Okay. These oral motions, as I'm sure you know, are generally not lengthy.

MR. PRESCOTT: Indeed.

THE COURT: Okay.

MR. PRESCOTT: And they will be oral only.

THE COURT: Okay.

MR. PRESCOTT: I'm sure the Court is aware of the standard under Rule 50(a) that we are now looking at; whether [1523]a reasonable jury would have a legally sufficient evidentiary basis to find for the party on an issue. This is not quite the summary judgment standard anymore.

The first issue I would like to raise is the issue of the damages that are attributed to the two alleged co-conspirators, Tiger and Hualong.

Now, we heard testimony yesterday that there is simply a complete absence of evidence in the record as to whether those, the contracts of sale by those two entities to U.S. customers had arbitration clauses or not, so we cannot ascertain and no one has ascertained whether they fall within the scope of the class. Therefore, too, and I mention as Dr. Wu mentioned, that for the other defendants an expert was hired for two of them to review all the contracts, see if they had arbitration clauses, for

two of the other defendants they produced their contract lists indicating with or without arbitration, but for Tiger and Hualong it is simply unknown.

Proving damages is the plaintiff's burden and we are at a point where there is nothing in the record, it is simply guesswork, and to strike that portion of plaintiff's damage claim would clearly meet the Rule 50 standard.

THE COURT: I'm not sure what you're asking for.

Are you asking me to reduce the $54.1 million damage claim by a certain amount?

MR. PRESCOTT: Yes. By 7.5 million.

[1524]THE COURT: All right.

MR. PRESCOTT: Which is the amount attributable to Tiger and Hualong sales. That's only evidence of their sales in the record.

THE COURT: Okay.

MR. PRESCOTT: And it's in Dr. Wu's testimony.

If it helps, it's this bar chart from yesterday.

THE COURT: Right.

MR. PRESCOTT: The second round for a Rule 50 motion I'm sure does not surprise the Court, and you've heard it before, it is the Act of State doctrine.

Appendix H

Very recently, just in December, the Second Circuit has expounded on the doctrine in the *Konowaloff* case. It is 702 F.3d 140 starting at 145. If it's of any help, I have a printout for the Court and for Counsel.

THE COURT: I'd like that, thank you.

(Handing.)

MR. PRESCOTT: And it, the Second Circuit in December of 2012, repeats the well-known doctrine. It's on page four of the Lexus printout.

THE COURT: It's a very different context; isn't it?

MR. PRESCOTT: It was a seizure by, of property by the, by the former Government of the Soviet Union, of Russia.

THE COURT: Right, I remember the case.

MR. PRESCOTT: However, the Court says, Second [1525]Circuit says when it is made to appear that the foreign Government has acted in a given way, the details of such action or the merit of the result cannot be questioned, but must be accepted by our courts.

Also, the doctrine has been recently discussed by Judge Stein in a case in which I happened to also be involved. It's the *Republic of Iraq against ABB, et al.*, Southern District, filed February 6th, 2013.

THE COURT: Yes, I read that case.

MR. PRESCOTT: And I would point out that this, the Court, including Your Honor and the Magistrate Judge, and we submit the huge weight of the unrefuted evidence show that the Chamber was an agency of the Government of China.

This is not an issue that we have injected into this case. The reference to the Chamber of Western Medicines was in the case from the day the first complaint was filed, well nigh eight years ago, and there is no way to send this case to a jury without instructing the jury that it is to sit in judgment on the credibility of a former Chinese government official, Mr. Qiao.

So, on Act of State grounds, we would also submit that it is time now to dismiss this case under Rule 50.

THE COURT: But I thought the whole reason Mr. Qiao was allowed to testify was because, in fact, he is a former official and what was communicated to me by the defendants [1526]previously was that it is as a result of his being a former official that he became available at a late date to testify.

Now, if that's true for sovereign immunity purposes, you're claiming that he can still fall within Act of State and it would violate the Act of State doctrine to allow a jury to determine whether his perspective on what happened in his interactions with the defendants is credible or not?

MR. PRESCOTT: Yes, Your Honor.

Because as we were told, and as we informed the Court he's no longer, he's now retired; however, he was testifying

to the time period when he was an official at the Chamber reporting to MOFTEC and then to MOFCOM. He was testifying with regard to the time when he was acting in his official capacity. That is our view there.

Finally, and I'll turn it to Mr. Critchlow, we believe on the issue of compulsion by Mr. Qiao that all that has been presented is innuendo, testimony from people who were not present at any of the events and reading against them portions of documents. So, we would ask, also, for a Rule 50 dismissal on the compulsion ground.

We have one other point, which Mr. Critchlow will address. Thank you.

THE COURT: All right, thank you Mr. Prescott.

MR. PRESCOTT: Thank you for your time.

MR. CRITCHLOW: Thank you, Your Honor.

[1527]The final Rule 50 motion concerns North China Pharmaceutical Group Corporation. The issue that's being framed for decision to go to the jury is whether Group Corporation entered into an agreement with competitors to fix prices. It's not whether they had a website that says they sell vitamin C. It's not whether they received or may have received a few reports reporting on sales of vitamin C. The issue is whether Group Corp knowingly entered into an agreement by an authorized representative to fix prices. And the issue, the standard is whether a reasonable jury could have a legally sufficient basis to determine that such agreement was entered into by Group Corp by a preponderance of the evidence.

So, what is the evidence here? The evidence here is that in November of 2001, the agreement that is alleged to have formed the conspiracy was signed by Hebei Welcome. Not by Group Corp, we have the document in the record. I think it's trial Exhibit 26. Defendant Trial Exhibit 26. But anyway, we have that document in the record, it's signed by Welcome. All of the minutes of the Chambers meeting that Mr. Wang Qi put in the record -- and I think there are roughly twenty -- all identify Hebei Welcome as being at the Chamber meetings.

In resect of Mr. Huang, there are six minutes, also by I believe Mr. Wang Qi, that identify Mr. Huang as [1528]representing Hebei Welcome. There are no documents in the record, no documents in the record that identify Mr. Huang as representing anyone else. None. Except for the statement in the Chamber website that we looked at in the summary judgment motion where Mr. Qiao admittedly identified Mr. Huang as a deputy general manager of Group Corp, but Mr. Qiao testified that he did that for purposes of honoring Mr. Huang, for purposes of referring to his highest title and Mr. Qiao, unequivocally stated that he had no doubt in his mind when he was dealing with Mr. Huang that he was dealing with Mr. Huang as a representative of Group Corp.

In addition, if you look at the bylaws of the Chamber and the membership list of the Chamber, the member is identified as Hebei Welcome. The member of the subcommittee is identified as Hebei Welcome. The eligibility for serving as a rotating chairman or serving on a subcommittee is conditioned on representing a manufacturer member. And all of the minutes in respect of the election of the rotating chairman identify that post

is rotating among companies, including the rotation to Mr. Huang.

So, Your Honor, there are a couple of things on one side of the scale I would submit to Your Honor that they've got a couple of feathers and they've got a couple of sticks, but on the other side of the scale there are a ton of bricks -- documentation, records, requirements -- that all say [1529]that it was Hebei Welcome that entered into these agreements. And therefore, I think that under the standard that we're looking at now, which is different from the summary judgment standard, that granting the Rule 50 motion is appropriate.

Thank you, Your Honor.

THE COURT: All right, thank you.

I'll hear from plaintiffs.

MR. ISAACSON: With respect to the damages issue, Your Honor, Your Honor has ruled on this issue previously and for the reasons stated in our briefs at the time and the Court's ruling, this is properly an issue to be submitted to the jury. We never felt that the burden should be on us to show these arbitration clauses.

However, we think the Court's ruling is bolstered and has been made stronger at the trial because the issue for the jury is whether a reasonable economist would, what they would do with this issue in estimating damages. Dr. Bernheim testified that in that the lack of documentation, in his opinion, it was appropriate to estimate the damages at 54.1 million.

What we found out from the testimony of Dr. Wu is he received an instruction to exclude these, instruction from Counsel to exclude these items from the damages calculation. So, at this point, we think that this issue is more than sufficient to go to the jury based on what's happened since [1530] the Court's ruling.

THE COURT: Let me ask you this. Was there any reason why either party could not have subpoenaed at least the U.S. customers of Tiger and Hualong and gotten copies of their template contract to see if there's an arbitration clause?

MR. ISAACSON: I don't have any reason why either party can't issue a subpoena in the United States.

THE COURT: But I mean, that evidence would have shown one way or the other if there was an arbitration clause or not.

MR. ISAACSON: Correct.

THE COURT: Right.

MR. ISAACSON: We would point out that defendants' evidence is that, I mean, obviously Hualong and Tiger are at some of these meetings and it's defendant's evidence that Chambers has power to require them to submit documentation, the evidence has shown that the Chamber was actively involved in the defense of this case and so, our expectation is that if such documents existed, they would have appeared in the case.

THE COURT: Okay. Thank you.

MR. ISAACSON: All right.

With respect to the Act of State doctrine, I think the Second Circuit decision says the same thing as *W.S. Kirkpatrick* of the Supreme Court where the issue is, is the Court going to say that something that the Government of [1531]China did was unlawful? The Second Circuit case says the lawfulness of the Soviet Government's taking of the painting is precisely what the Act of State doctrine bars.

We are not asking the Court to pass on the lawfulness of any actions of the Chinese government. In fact, we are actively disputing the involvement of the Government of China in the facts of this case.

There is no, with respect to this issue that the Chamber is a Government agency, that is actually -- that would be contrary to the Court's summary judgment decision and there is actually no witness who has uttered the language that this is a Government agency. They call it subordinate and indeed, Mr. Qiao Haili's opening testimony was he was assigned to the Chamber.

This jury will not be sitting to judge the credibility of the Chinese government or of a former Government official because what we will be arguing is that this gentleman did not actually give any directions.

Appendix H

The jury will not be asked to consider the lawfulness of directions of the Chinese government. We will be saying that no such directions happened from the Chinese government and we will challenge the credibility of people who say that the Chinese government had actually any involvement in this.

In any event, we think that the Act of State issue [1532]was resolved by the Court's summary judgment motion and for the reasons stated in the briefing then and in the Court's decision, we don't think there's any basis for that.

On the issue of compulsion and innuendo, it being mere innuendo, we have put in a substantial documentary record that this wasn't a matter of compulsion, this was a matter of voluntary agreement and we will be going through that in closing argument. But the Court, I think, also dealt with this issue and reviewed this record at summary judgment and we briefed it then.

Now, with regards to North China. The Court obviously ruled on this on summary judgment and we think the Court got it right, and we think the evidence is now stronger with respect to North China's participation in the conspiracy than it was at the time. And we think, at a minimum, there is a genuine issue of material fact for the jury, particularly concerning the dual role of Huang Pinqi at Hebei Welcome in North China.

Now, as the Court knows; first, he was elected to head the vitamin C subcommittee in 2005 and had the

leadership position of that vitamin C subcommittee all throughout that year and attended conspiracy meetings during that period.

During that period, secondly, Mr. Huang operated exclusively from North China beginning in November 2003. That's where he had his desk, that's where he had his office, [1533]North China Group Pharmaceutical Corporation, and what we now know and was not discussed in the summary judgment decision is plaintiff's Exhibit 111, which was sent by Mr. Huang, this is now -- he's not with North China yet -- it's sent to the chairman of North China. A document that describes the conspiracy, that describes the all different issues about vitamin C, and that actually talks about the importance of groups and support of the groups to Hebei.

So, at a minimum, Mr. Huang Pinqi, reporting and acting on behalf of North China at that point and through PX 111, would also support submitting this issue to the jury.

In addition, once he moved to these offices, this would be the third point, is that he received at his North China Group Pharmaceutical Group Corporation offices detailed reports of Hebei's Welcome's vitamin C business such as Plaintiff's Exhibits 119 and 306. These reports are specifically addressed to the Group Corporation, they include information about vitamin C production, sales targets, strategies, et cetera. They also refer to the agreements on productions suspension.

Again, these are reports to Mr. Huang Pinqi while working for the corporation about the status of agreements and the status of the vitamin C industry, which means when he's attending vitamin C subcommittee meetings during the same period, there is a viable issue for the jury that he is acting [1534]on behalf of the company where he goes to work every day, where this is a matter of some -- and a company to whom this is a matter of some importance.

In fact, the testimony, which was not at an issue at summary judgment, is that it's Chinese custom to consider people and refer to people by their highest titles. It becomes implausible that when this gentleman is working for the highest entity, North China, and he walks into a meeting that everybody is sitting there thinking of his by his lowest title. That is a viable issue that the jury needs to resolve.

The evidence is extensive that North China Pharmaceutical Group Corporation was concerned with, and keeping its eye on, and is monitoring vitamin C and vitamin C production issues, which means that when he's got two hats, the North China hat, the vitamin C is very important to the North China hat; all of which again, makes it an issue for the jury to resolve as to which hat he is wearing at these meetings.

And that's where all the Exhibits from the websites and the other documents and from the business documents talking about vitamin C and North China are involved, including PX 111, which refers to the importance of the

North China brand name to Hebei Welcome, the evidence that from Mr. Huang that NCPC was responsible for strategic negotiations with the Dutch company DSM.

[1535]I mean, here they want to argue to the jury that North China Pharmaceutical Group Corporation was just an investment company and had no involvement with vitamins. At the same time, the gentleman admitted that it was North China that was handling strategic negotiations, including potential joint ventures about vitamin C, which I think led to an agreement but not a contract, according to his terms, which again makes it a jury issue as to who this gentleman is acting beyond, because it's not plausible that he's in high-level strategic negotiations about vitamin C with a Dutch company, but when he goes to a vitamin C subcommittee meeting that he is not wearing his North China hat.

There are documents, the majority of the JJPC documents, the large majority referred to him as being from Hebei but there are documents referring to North China being at those meetings or referring to their vitamin C competitor as being North China. That would include PX 259 and PX 144.

So, for all those issues, reasons, we think that this is an issue for the jury. The Court got it right and the strength of the evidence, the strength of the position that this is for the jury to resolve remains -- has become stronger.

And then, at the point, I think we're obligated to make a motion at this point, too, if you want to hear that.

THE COURT: Really?

[1536]MR. ISAACSON: Yes.

Because this comes about because the Court indicated that it was considering taking this verdict as an advisory verdict, all right, which I think makes us obligated at this point, potentially obligated, to make a directed verdict motion under both Rule 50 and Rule 44.1, at least with respect to parts of the case.

We understand the Court would want an advisory jury verdict and would want to reserve decision on this motion, but to protect our ability to make this motion after trial, we think we ought to put it in the record that for the reasons that the Court stated in its Rule 44.1 decision, the summary judgment decision and our briefing with respect to that, that the Court would be correct that we are entitled to judgment as a matter of law with respect to the compulsion defense and with respect to the conspiracy points with respect to Hebei -- with respect to Hebei. We understand that North China with respect to conspiracy would still be a disputed issue of fact.

And the basis for that are what we've set forth previously, but to summarize for the record, during the trial there's been no evidence from November 2001 to June 2006 that the Ministry of Commerce directed Mr. Qiao to require minimum prices of 3.35, prices higher than 3.35, export volume limits, production stoppages or a common warehouse. During that period the Ministry of Commerce did not discuss specific [1537]prices with

Mr. Qiao. The Ministry of Commerce stopped attending vitamin C subcommittee meetings by November 2001 and until the lawsuit was filed. And at some point after the lawsuit was filed, the company stopped their phone calls where they fixed prices and the vitamin C subcommittee stopped meeting.

Even if the Government had given instructions to Mr. Qiao, the companies base their whole case for compulsion on verification and chop because we know that before verification and chop, there were price wars in the 1990s and 2001; that after verification and chop ended in May 2008, that Mr. Qiao said there were no more agreements or authority to enforce agreements. And we know that the defendants argue that Penicillin, in the Penicillin subcommittee, there was no authority over those people because there was no verification and chop.

THE COURT: I'm sorry, does this go to your argument that I ought to be granting directed verdict as a matter of law as to the defendant's affirmative defense of compulsion?

Is that what this is?

MR. ISAACSON: Yes.

THE COURT: Okay.

MR. ISAACSON: Yes. I suppose it also could be considered reply to their motion on the same thing, saying all we have is innuendo.

[1538]THE COURT: Right.

MR. ISAACSON: The illegal conspiracy agreements were not compelled by Mr. Qiao or anyone else. The documents show discussions followed by voluntary agreements that no one ever order the companies to charge more than $3.35, that the chitchat price fixing was not ordered. The charter showed that the vitamin C subcommittee was a voluntary organization and Mr. Qiao testified that they were passed by a vote of the members and the evidence, which was also dealt with in the summary judgment decision, on how the companies broke their agreements.

Verification and chop does not constitute compulsion because verification and chop enforced voluntary agreements.

The companies ignored or evaded verification and chop and, in any event, the most the evidence could say is that verification and chop applied to $3.35, which was an agreed-to price.

The evidence also shows companies were free to agree to cancel or lower minimum prices. The documents show Qiao Haili asking questions, not giving orders. No documents show Qiao Haili giving instructions or issuing orders before the lawsuit was filed. And even the company witnesses said over and over again that the Chamber made requests. They also said the Chamber made directions, but they use the term interchangeably.

[1539]We understand, as we said, that the Court is considering taking the jury verdict as advisory, so we feel we needed to make those statements at this time.

THE COURT: All right.

Mr. Prescott.

MR. PRESCOTT: May I have 30 seconds on the first two motions?

THE COURT: You may have 60.

MR. MASON: Thank you.

The Court asked with respect to the Tiger and Hualong issue whether either side in the case could have simply subpoenaed the customers of Tiger or Hualong in the United States.

It is the plaintiff's burden to prove their damages. That is what the Court's proposed jury instruction so states at page the 27 and 28. That is well-worn law. The defendants do not have that burden. There is complete absence of evidence in the record on that point.

On the Act of State issue the Court may recall that shortly before trial the plaintiffs asked the Court to, in effect, rewrite one or two decisions of the Magistrate Judge in which he stated that the Chamber was an agency of the Chinese government.

In addition, I would point the Court to page 45 of its September 6, 2011, decision, at which the Court accepts [1540]the Ministry's explanation for the relationship between the Ministry and the Chamber.

And with the Court's permission, Mr. Critchlow will address the point Mr. Isaacson has raised and may wish to speak further on the Group Corp issue.

THE COURT: When you say the point that Mr. Isaacson has raised.

MR. CRITCHLOW: I believe the advisory jury point, Your Honor.

THE COURT: All right.

MR. CRITCHLOW: So, briefly as to Group Corp. I guess all I can do is repeat that the issue is whether Group Corp entered into an agreement with competitors to fix prices.

The documents that Mr. Isaacson cites in the nature of reports, which are or full-year reports or half-year reports contain no requests for direction from Group Corp, no indication that any direction from Group Corp was given, no indication that Group Corp itself actually entered into agreements which was clearly done at the Chamber level, according to the various minutes and, in fact, the only signed agreement that we have in the record.

Mr. Isaacson had cited two Jiangsu documents which I believe he says that indicate that Group Corp participated in meetings. If you look at one of them, which is the one of the [1541]two which purports to be notes not by Mr. Wang Qi but by Mr. Wang Qiang, you will note that it does say North China Pharmaceutical Group Corp. And next to it, it has the name Zhang Yingren.

The testimony is undisputed in the record that Mr. Zhang Yingren was solely an employee of Hebei Welcome, had no responsibilities whatsoever at Group Corp and I would submit to Your Honor that Mr. Wang Qiang simply got it wrong. That document can't stand in view of that testimony. And the other document is actually linked to that meeting, refers to the same thing.

And so, for those reasons, I still believe, Your Honor, that the overwhelming weight of the evidence, the standard that needs to be looked at in a Rule 50 motion which is not the Rule 54 motion but asks whether a reasonable jury under the appropriate legal standard could find based on a preponderance of the evidence that Group Corp knowingly entered into an agreement, that this record clearly, clearly does not allow for such a finding by any reasonable jury.

Briefly, with respect to the advisory jury point. It is true that Your Honor indicated at the start of these proceedings that that was a possibility, depending upon how you decided to charge the jury and the verdict form that would be used at the end. I've looked very carefully at the charge that you've given to us and a verdict form and it's a standard [1542]charge to a standard jury. There's

no indication here of any particular special mechanism for an advisory jury so I'm taking it that Your Honor is not intending to use an advisory jury.

If that were contemplated, which I submit at this late date is a difficult point to address, Your Honor's discussed this in the past. There are two case, both 30 years old, one from the Second Circuit which is the Mara case. There's one from the Eastern District, which is the Chance case. The Mara case clearly said no advisory jury under situations like this. Your Honor's suggested that the Chance case said differently, but if you look at the Chance case, it allowed an advisory jury on a predicatory issue of choice of law, but said that the jury in Chance would still determine the ultimate facts on the merits, and that's what we're talking about here.

And actually, I think I go back to what my evidence professor Weinstein said in his decision. Judge Weinstein, in the *City of New York v Barrett* case which is a 2004 case here in the Eastern District, 317 F. Supp. 193, and he said – and it's pretty simple -- he said when in doubt, send it to the jury and that's exactly what we've got right here.

And so, I don't think that's what we're looking at, but that's defendant's position on the question, Your Honor.

THE COURT: Okay.

[1543]All right, well, let me start at the bottom, first.

I tend to agree that this is not going to be an advisory

jury. I was concerned at the beginning of the case that it might not be possible to avoid having the jury determine some of the facts that I determined in the 44.1 inquiry. However, that didn't happen. It's entirely possible. There are a couple of slight overlaps that are raised, I think, in plaintiff's motion in limine that was filed early this morning, but I have no doubt that we can straighten that out for the jury.

So, I will not be regarding the jury's verdict as advisory. It will be a binding verdict on the questions that I am going to put to them and the charge that I'm going to give to them. So, that is not an issue.

Let me talk first about Tiger and Hualong.

MR. ISAACSON: I'm sorry, to interrupt, Your Honor.

THE COURT: Yes.

MR. ISAACSON: Just to be, for the record, may we, we just want to reserve our position that we would be entitled to judgment as to matter of law with regard to compulsion with regards to conspiracy with respect to Hebei.

THE COURT: Understood. Your position is reserved.

If there was some kind of presumption that these contracts have an arbitration clause, then I could understand defendant's point. But as we know, there is no such [1544]presumption possible. We don't know that there is an arbitration clause. We don't know that there isn't. I think when the plaintiff, which clearly has the burden of proof on all elements of its damage claim, puts the contracts of sale into -- it quantifies them for purposes of claiming damages on them, it has met its burden of going forward on that issue.

It then becomes incumbent on the defendants, it seems to me, to come back and say wait a minute, that's wrong, those contracts should not be included. They are contracts. They are prima facie evidence of sales and unless there's some reason the defendants want to offer to show that they ought to be excluded, then I think they should not be. So, I am rejecting that point.

On the Act of State doctrine I will adhere to all of the statements I made on my prior ruling holding it inapplicable. I think this is clearly not a case where anyone will be judging whether the Chinese government has acted in an illegal fashion. Plaintiffs can only prevail here if the jury determines that the Chinese government did not act. Period. So, for that reason and the others that I've stated, I think the Act of State doctrine is, the motion directed to that, must be denied.

On the compulsion defense, I think we clearly have factual issues. I see them now much better than I did at the beginning of the case and even beyond that, more

clearly than [1545]I did when I was writing the summary judgment decision. We essentially start with minutes of meetings which show an absence of compulsion; at least, a jury could reasonably find that they show an absence of compulsion.

We then have witness testimony that says you can't go strictly by the literal language of the minutes because that's not what was going on. That's an issue for the jury to determine who is right on that.

This notion that the minutes don't mean what they say and the presentation of a unanimous agreement is not necessarily indicative of the true state of affairs is not implausible to me. It seems to me there are societies where things are made to look like everyone is in perfect agreement when, in fact, sometimes people have no choice. But that's an argument for the jury.

I didn't hear any expert testimony from a sociologist or a political scientist explaining how this is a basic rubric of Chinese society and, while I may have some individual views about that, that obviously has no role in this case. So, I think we plainly have a factual issue on compulsion and I'm very glad that we set up the trial this way because I think it's really been teed-up excellently by both sides and the jury will have the ability to determine who has the more credible position on that.

The closest question is on Group Corp. I am going [1546]to adhere to my decision on summary judgment. I think Mr. Isaacson is right; that there is a little more

suggestion than there was then that Group Corp was involved in this sufficiently to put liability. I will tell you candidly, I'm not entirely comfortable that there is enough there to sustain a jury verdict.

It is certainly not uncommon for a parent corporation or investors in a corporation to monitor the financial activity of the corporation and it is also not uncommon for there to be some shared facilities.

You know, it is not the fact of this case, although it is common in many other cases, that a corporate family will use a cash-sweep method where all cash and all subsidiaries is swept up to the parent and then, doled out as operating funds to the subsidiaries; even in that situation the parent is not generally deemed to be acting for the subsidiary, but I do think that it is a close enough issue where the exercise of discretion suggests that I put it to the jury and let the jury decide on it and then address it later, if necessary.

(Continued on following page.)

[1547]THE COURT: (Continuing) I am therefore going to reserve decision, which I think I can still do under Rule 50, on that point. If I can't do it, then I am denying the motion to dismiss at this stage pending the jury's verdict.

All right. That's my ruling on the Rule 50 motions. Let's now start the charging conference.

****

APPENDIX I — SPECIAL VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MARCH 14, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-1738 (BMC) (JO)
05-CV-0453

IN RE VITAMIN C ANTITRUST LITIGATION

This document relates to:

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Plaintiffs,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Defendants.

SPECIAL VERDICT FORM

We, the jury, unanimously agree to the answers to the following questions and return them under the instructions of this Court as our verdict in this case:

Question 1: Did plaintiffs prove, by a preponderance of the evidence, that the following defendants knowingly

entered into an agreement or conspiracy with the purpose of or predictable effect of fixing the price or limiting the supply of Vitamin C?

A. Hebei Welcome Pharmaceutical Co., Ltd.

X	
YES	NO

B. North China Pharmaceutical Group Corp.

X	
YES	NO

If your answer to any part of Question 1 is "Yes," please answer Question 2. If your answers to both parts of Question 1 are "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 2A: Did plaintiffs prove, by a preponderance of the evidence, that the plaintiff class was in fact injured as a result of defendants' alleged violation of the antitrust laws?

X	
YES	NO

Question 2B: Did plaintiffs prove, by a preponderance of the evidence, that defendants' alleged illegal conduct played a substantial part in bringing about or causing their injury, and that the injury was a direct and proximate result of the unlawful activity?

YES	NO
X	

Question 2C: Did plaintiffs prove, by a preponderance of the evidence, that defendants' alleged illegal conduct resulted in plaintiffs and the class members paying higher prices for their vitamin C purchases than they would have paid had the agreements not existed?

YES	NO
X	

If your answer to all parts of Question 2 is "Yes," please answer Question 3. If your answers to any part of Question 2 is "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 3: Did defendants prove, by a preponderance of the evidence, that defendants were actually compelled by the Government of China to enter into agreements fixing the price or limiting the supply of vitamin C exported from China from the period of December 1, 2001 to June 30, 2006 and that defendants faced the prospect of penalties or sanctions for not complying with the directives or commands of the Chinese government in this regard?

YES	NO
	X

If your answer to Question 3 is "No," please answer Question 4. If your answer to Question 3 is "Yes," please go to the end of the verdict form, and sign and date it where indicated.

Appendix I

Question 4: Did plaintiffs prove, by a preponderance of the evidence, that they suffered damages in an amount that is ascertainable and not speculative?

X	
YES	NO

If your answer to Question 4 is "Yes," please answer Question 5. If your answer to Question 4 is "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 5: What amount of damages have plaintiffs proved, by a preponderance of the evidence, that the plaintiff class suffered as a result of defendants' conduct?

$54.1 m
(Please fill in total dollar amount)

The jury foreperson must sign and date this form.

Signed: /s/ Date: 3/14/13
Foreperson

APPENDIX J — PETITIONERS' PETITION FOR REHEARING OR REHEARING *EN BANC*, DATED OCTOBER 4, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

13-4791-cv

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (BROOKLYN)

PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR REHEARING *EN BANC* ON BEHALF OF PLAINTIFFS-APPELLEES

ANIMAL SCIENCE PRODUCTS, INC.,
THE RANIS COMPANY, INC.,

Plaintiffs-Appellees,

– v. –

HEBEI WELCOME PHARMACEUTICAL CO. LTD., NORTH CHINA PHARMACEUTICAL GROUP CORPORATION,

Defendants-Appellants.

Appendix J

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[Tables intentionally omitted]

Appendix J

RULE 35(B) STATEMENT

This case involves questions of exceptional importance under the U.S. antitrust laws and the doctrine of international comity: whether a panel of this Court correctly vacated a jury verdict after giving conclusive deference to the Chinese Ministry of Commerce's ("Ministry") Amicus Brief, which contended that Chinese law compelled the conduct found by the jury to violate the Sherman Act. Two district judges concluded that the Ministry's assertions were not supported by Chinese law and both judges and the jury found that the assertions were contrary to the factual record of whether compulsion actually took place.

As detailed below, the panel decision conflicts with (1) Supreme Court precedent concerning the doctrine of foreign government compulsion; (2) circuit precedent concerning deference to statements of foreign governments; (3) precedent concerning the review of a pretrial dispositive motion where the trial has actually taken place; and (4) Fed. R. Civ. P. 44.1 concerning the evidence that should be considered in construing foreign law. The decision has far-reaching consequences, and will undermine enforcement of the U.S. antitrust laws by permitting foreign governments to submit post hoc excuses to shield their country's industries from liability.

BACKGROUND

The panel decision ("Op." attached as "Exhibit A") vacates a jury verdict and judgment under the U.S.

antitrust laws after concluding that the doctrine of international comity required conclusive deference to an Amicus Brief from the Ministry stating that the violations of U.S. antitrust law in this case were compelled by the Chinese government.

The panel agreed that there "is competing authority on the level of deference owed by U.S. courts to a foreign government's official statement regarding its own laws and regulations." Op. 23-25 (citing competing decisions of the Third, Fifth, and Seventh Circuits). The panel concluded that an official statement by a foreign government should be conclusive: "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer[1] regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Op. 30. The panel acknowledges that although "on their face the terms 'industry self-discipline,' 'coordination,' and 'voluntary restraint' may suggest that the Defendants were not required to agree to 'industry-wide negotiated' prices," but "defer[s] to the Ministry's reasonable explanation that these are terms of art within Chinese law connoting the government's expectation that private actors actively self-regulate...." Op. 33. As a result, "because the Chinese Government filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin

1. The position of the Chinese government was submitted to the district court in the form of an Amicus Brief and not a "sworn evidentiary proffer."

C sold abroad" international comity required the district court to abstain from exercising jurisdiction. Op. 4.

The decision states that because "we vacate the judgment and reverse the district court's denial of Defendants' motion to dismiss, we do not address the subsequent stages of this litigation." Op. 3 n.2, Although a trial took place, the panel states that the facts are those in the Second Amended Complaint and the district court's decision denying the motion to dismiss. Op. 5 n. 3.

The panel decision does not reach Appellants' other defenses, including the defense of foreign sovereign compulsion.

REASONS FOR GRANTING REHEARING

Based on the evidence in discovery and then at trial, the district court concluded that Appellees' antitrust damages stemmed from Appellants' *voluntary* actions, rather than any sovereign acts of the Chinese government. SPA-36, 65-68, 71-77. The panel's decision not to consider the evidence endangers enforcement of the U.S. antitrust laws against foreign cartels. By mandating that courts award conclusive deference to the statements of foreign governments and on appeal disregard any evidence apart from those statements on their face, the panel eliminated the need for analysis of the factors relevant to a foreign sovereign compulsion defense. When a government declares that it compelled conduct, no further analysis is permitted, including evidence that there was no compulsion.

For this result, the panel relies on the doctrine of international comity, which is based on "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). It "is neither a matter of absolute obligation... nor of mere courtesy and good will." *Id.* This Circuit has described the doctrine as "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith." *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (internal quotations omitted). "[T]he doctrine is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." *Id.* at 423 (internal quotations omitted). To trigger the discretionary doctrine, the Supreme Court has held that a "true conflict" must exist between U.S. and foreign law such that compliance with the laws of both countries is impossible. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993).

I. The Panel's Interpretation of International Comity Creates a Conflict with Supreme Court and Other Case Law on Foreign Sovereign Compulsion.

The panel erred in holding that the district court should have awarded conclusive deference to the Ministry's statement that Chinese law *compelled* the Defendants to act in violation of U.S. antitrust laws, overriding existing case law stating the requirements of a defense of foreign sovereign compulsion. The panel also

found that the district court committed error using the same analysis of foreign sovereign compulsion found in the Antitrust Guidelines promulgated by the U.S. Department of Justice. *Compare* Op. 36; see SJ Order at 29, 35.

The panel found three "problems" with the district court's analysis of foreign sovereign compulsion using the "amorphous" doctrine of international comity. The first analytical problem that the panel decision points to is the district court's consideration of "whether Defendants petitioned the Chinese Government to approve and sanction such conduct." Op. 36. The panel next took issue with the district court's "reli[ance] on evidence that China's price-fixing laws were not enforced." Op. 36. A third problem the panel found was that the district court "determined that if Chinese law did not compel the exact anticompetitive conduct alleged in the complaint, then there was no true conflict." Op. 36.

Each of the purported "problems" identified by the panel are express requirements for the defense of foreign sovereign compulsion in an antitrust case. The panel's conclusion that it was irrelevant whether the Chinese government was sanctioning private conduct directly conflicts with Supreme Court decisions on foreign sovereign compulsion. Those decisions hold that a defense of foreign sovereign compulsion to an antitrust claim does not extend to voluntary conduct that is sanctioned or facilitated by a foreign government. A-1909-10 at 1760:3-1761:13; *accord Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275 (1927).

The panel's analysis on the relevance of actual enforcement of Chinese law conflicts with the requirement that the defense of foreign government compulsion against an antitrust claim requires proof of enforcement with sanctions and penalties. U.S. DOJ & FTC ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.32 (1995) ("INTERNATIONAL GUIDELINES") ("the foreign government must have compelled the anticompetitive conduct under circumstances in which a refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441 (1987).

Likewise, the panel's holding that it was error to consider whether Appellants' specific conduct was compelled, Op. 3, contradicts the principle that private conduct violating the U.S. antitrust laws may not go beyond what the foreign government compels. INTERNATIONAL GUIDELINES § 3.32 ("a direct conflict may arise when the facts demonstrate that the foreign sovereign has compelled the very conduct that the U.S. antitrust law prohibits").

The panel decision will have far-reaching consequences. In holding that whether Appellants charged prices in excess of those mandated "does not weigh heavily" in the court's analysis of compulsion, the decision would immunize all price-fixing by foreign companies above a compelled minimum price. Op. 39. The literal result will mean foreign government compulsion of even a penny of price fixing will permit unlimited voluntary price fixing by foreign companies.

The facts here illustrate the dangers for antitrust enforcement. The district court correctly found that, even if Appellants were required to "coordinate" on a minimum price, the only minimum price was $3.35 and Appellants exceeded the scope of any compulsion by agreeing to fix prices well above $3.35 and by agreeing to restrict production. SPA-55-56. The evidence showed: "Yes, when [the price is] over [$3.35], they [the Chamber] don't care." A-1709-10 at 362:25-363:7. Mr. Qiao admitted that there was no direct authorization for the Chamber to use its verification and chop procedures to control export volumes. A-1799-1800 at 1032:24-1033:22. The chop form on which Mr. Qiao relied did not even have a field to report volume agreements. A-1934-38. The illegal conduct found by the jury thus was based on conduct that Chinese law did not actually compel.

II. The Panel Decision Conflicts with Decisions of this Circuit Concerning the Appeal of an Earlier Dispositive Motion Following Trial and the Conclusive Deference Afforded the Ministry's Amicus Brief.

A. The Panel's Decision Granting the Chinese Government Amicus Brief Conclusive Deference Conflicts with Circuit Law.

The panel's decision that the Ministry's statements in the Amicus Brief are conclusive on the issue of whether the companies' conduct was compelled – no matter what the evidence actually shows – conflicts with other decisions of this circuit. The district court followed two decisions

of this circuit that the statement of a foreign government is entitled to substantial deference, but is not conclusive. *Duran v. Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008) ("even if [Chilean Authority Statement] is authoritative, the district court was not bound to follow it"); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) ("a foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference").

The panel's decision to grant conclusive deference to statements in the Ministry's Amicus Brief is particularly startling because the Chinese government has flatly taken the opposite position in statements to the World Trade Organization. G/C/W/438 (20 November 2002), at 3 (it gave up "export administration . . . of vitamin C" in 2002); Brief for Plaintiffs-Appellees at 41 (2d Cir. Aug. 11, 2014), ECF No. 174. China has also told the WTO that vitamin C was not one of the materials subject to minimum prices. *Id; see also* A-468-69, A-519.

The panel distinguishes *Villegas Duran* because the position of the Chilean Government was presented by a sworn affidavit, rather than by appearing in the case as Amicus. Op. 28. This is form over substance, particularly given that the panel's decision states that position of a foreign government should be stated in a "sworn evidentiary proffer," which happened in *Villegas Duran*, but not here.

The panel states that *Villegas Duran* was vacated by the Supreme Court in light of *Abbott v. Abbott*, 560

U.S. 1 (2010). In *Abbott*, the Supreme Court and Second Circuit did *not* accept a foreign official's interpretation as "conclusive" – they agreed only after conducting their own analyses – just as the district court did here. *Id.* at 10-14; *Duran v. Beaumont*, 622 F.3d 97, 98-99 (2d Cir. 2010).

With respect to *Karahas Bodas*, the panel states that the court there ultimately adopted the Republic of Indonesia's interpretation, but that court did so, not by applying conclusive deference, but rather engaging in its own review.

The panel decision's exclusive reliance on the Amicus Brief of the Ministry also flies in the face of Fed. R. Civ. P. 44.1. Rule 44.1 provides that a federal court shall determine issues of foreign law as "question[s] of law" and authorizes the court to "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." "[F]oreign law is to be determined by the court, in light of both evidence admitted and the court's own research and interpretation." *Ackermann v. Levine*, 788 F.2d 830, 838 n.7 (2d Cir. 1986). Two district judges followed this rule and carefully considered all relevant sources in interpreting foreign law.

B. The Panel Decision Conflicts with Circuit Law on Review of a Pretrial Denial of a Dispositive Motion Following a Trial.

The panel's decision based its review on the record at the stage of the motion to dismiss and for that reason

conflicts with rulings of this circuit and the Supreme Court. Ordinarily a district court's denial of a motion for summary judgment, and by implication a motion to dismiss, is not reviewable following a trial and the record on appeal must be the record at trial. *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011); *Schaefer v. State Ins. Fund*, 207 F.3d 139, 142 (2d Cir. 2000).[2] "[E]ight circuit courts had recently adopted the rule that the denial of summary judgment is not reviewable on appeal after a full trial." *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 421 (4th Cir. 2005) (circuit court citations omitted).

In *Ortiz*, the Supreme Court did not permit petitioners to appeal an order denying summary judgment after a full trial on the merits because the questions raised on appeal did not present "neat abstract issues of law." 562 U.S. at 191 (internal quotations omitted).[3] In the context of the

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2. A motion to dismiss based on international comity that does not present a controlling question of law, but rather raises both factual and legal questions, is therefore within the discretion of the district court. Op. 14; *see Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998) (record insufficient to demonstrate conflict of laws for comity analysis); *Drexel Burnham Lambert Group v. Galadari*, 777 F.2d 877, 881 (2d Cir. 1985) ("when there are disputed issues of material fact, a motion to dismiss an action on the basis of international comity should not be granted without an evidentiary hearing"); *cf. Petrol Shipping Corp. v. Kingdom of Greece*, 332 F.2d 370 (2d Cir. 1964) (*en banc*) (per curiam) (remanding to decide issue of sovereign immunity only after full evidentiary hearing).

3. *Accord Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 201 n.2 (2d Cir. 2014); *Gamco Investors, Inc. v. Vivendi Universal,*

defense of qualified immunity, the Supreme Court held in *Ortiz* that, following a denial of summary judgment, the defense must be evaluated in light of the evidence at trial. *Id.* at 184. Here the issue of compulsion is not a pure issue of law as it depends upon a determination of foreign law as applied to the facts in this case.

In this case, the panel's decision rendered irrelevant the evidence at trial that there was no actual compulsion and only voluntary conduct, no matter how strong or conclusive that evidence. This decision to cut off consideration of the record at the motion to dismiss stage was critical to the outcome of the panel decision. The opinion expressly states that "if the Chinese Government had not appeared in th[e] litigation," the Court would find no error or abuse of discretion with the district court's "treatment of the evidence before it in analyzing what Chinese law required." Op. 35 n.10.

Even if it were appropriate to treat this as an appeal of a motion to dismiss, which it is not, the panel decision conflicts with circuit law because it fails to take the allegations of the Complaint as true. The district court

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S.A., No. 13-1194, 2016 U.S. App. LEXIS 17520 (2d Cir. Sept. 27, 2016). Several circuits have expressly held that the denial of a motion to dismiss under 12(b)(6) is not appealable after a trial, just as the denial of a motion for summary judgment is not appealable after trial. *ClearOne Commc'ns, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011) (sufficiency of allegations of complaint is irrelevant if plaintiff has prevailed at trial); *Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("After a trial on the merits, the sufficiency of the allegations in the complaint is irrelevant").

followed traditional standards and thus denied the motion to dismiss. SPA-1-31.

C. The Record Not Addressed by the Panel Overwhelming Shows Voluntary Conduct in Violation of the Antitrust Laws.

The evidence of voluntary corporate price fixing in the record here was overwhelming. As the district court held, plaintiffs could "only prevail here if the jury determines that the Chinese government did not act. Period." A-1867, lines 16-19.

As noted by the panel, the Amicus Brief stated that the alleged government compulsion here was implemented through the China Chamber of Commerce of Medicine & Health Products and its Vitamin C Subcommittee. Op. 9. The head of the Vitamin C Subcommittee, Qiao Haili, testified at trial. The jury heard Mr. Qiao's deposition testimony in which he said it was "accurate" that "export prices are fixed by enterprises without government intervention." A-1811, lines 1-11; A-1812, lines 6-11. Mr. Qiao admitted that "on the whole, the government did not involve itself in price fixing." A-1811, lines 2-15. A witness from one of the co-conspirators was asked about price understandings among the manufacturers and he confirmed, "Nobody's going to force them." A-1707-08 at 360:25-361:3.

Documents showed that Appellants *voluntarily* formed their cartel in 2001 in response to price wars and the anticipated abolishment of government export controls.

A-3879-85; A-2012 ("in order to turn the cruel situation of VC market, the 4 main domestic companies reached the common understanding of production limitation and price retention"); A-2080-82 ("hand voting"); A-2036 ("the industry exercised self-restraint").[4] Mr. Qiao admitted that from 2002 forward, no price limitations or agreements on export quantities went forward without the support of the majority of the manufacturers. A-1803, lines 11-15; A-1804, lines 13-14; A-3994, lines 12-16, 21. "If nobody agrees, then we could not have a stoppage. No agreement, no stoppage." A-1802 03 at 1037:21-1038:3. He also admitted it was "perfectly acceptable" for the companies to decide to have *no minimum prices.* A-1821, lines 3-11; A-1822, lines 20-24.

The evidence also showed that, rather than compulsion, the parties could withdraw from cartel agreements whenever they desired. A-1985 ("tore up the agreement"); A-2049 ("reneging"); A-2250 ("over threw the June production suspension agreement"); A-2257 ("unilaterally

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4. *See also* A-2100 (manufacturers "agreed to limit production during the first half of 2004"); A-1974 ("Concerned with price drop in the market, all participating manufacturers agreed to increase stock in the Shanghai warehouse"); A-2105 ("we had an agreement among all the producers, and the production shutdown in June is [] part of this agreement"); A-2161 ("The participants agreed on two measures: first, to raise the price quote unanimously . . . and second, each manufacturer will halt production for 40 days"); A-1967-68 ("We all agreed to set the floor price at 9.20 USD/kg"); A-1979 ("reached an agreement, in which the 6 domestic VC manufacturers will arrange to suspend production"); A-1944 ("All the agreements reached (and signed by representatives of all the companies)").

pulled out"); A-2001 ("damage to the agreement caused by Weisheng"); A-1705-06 at 350:16-351:10; SPA-101-02; A-1968 ("every manufacturer quoted prices lower than the floor price").

Not a single document created before the filing of this lawsuit reflected any instruction that compelled vitamin C prices. A-1700-01 at 329:4-330:2; A-1717-18 at 450:24-451:1. Rather, documents showed that the companies manufactured the government compulsion defense after the lawsuit was filed. A-2208 ("Even if we lost the case, government would take the foremost part of responsibility. After all, we need to do many things in a more hidden and smart way").

The evidence at trial further demonstrated that in July 2003, Mr. Qiao wrote a memo about vitamin C to the Ministry admitting that the compulsion defense in this case was never true. He wrote that "the legal standing of chambers of commerce is still not clear," his Chamber "need[s] support from relevant government departments," and the Chamber rules "become formality and only 'honest fellows will follow.'" A-2174. Mr. Qiao's testimony regarding this memo was shown to be false – he testified that the memo concerned a penicillin (rather than vitamin C) agreement, but on cross-examination was forced to admit that he had lied because the penicillin agreement took place after his July 2003 memo was written. A-1828-32 at 1152:6-1154:4, 1227:13-1228:3; A-1796-98 at 1028:20-1030:5, A-3991-92 at 235:16-19, 21; 232:5-235:9; A-1835, lines 4-18.

In the face of this evidence, the panel does not point to any Chinese law or regulation requiring fixing of prices or restrictions on supply, referring instead to what "the Ministry represented" in the Amicus Brief. Op. 10-11. The panel points to the Amicus Brief's reliance on a 2002 Notice, but that Notice only stated that the relevant chambers would provide information on "industry-wide negotiated" prices to Customs, and provided no guidance or requirement as to those "industry-wide negotiated" prices. SPA-302 at Art. 3. No one was required to agree on "industry-wide negotiated" prices. The Chamber filed a list of export prices "agreed by the industry" with Customs that left the price for vitamin C blank. A-1934-35.

CONCLUSION

Plaintiff - Appellees respectfully request that the petition for rehearing or rehearing *en banc* be granted.

Dated: October 4, 2016

/s/ William A. Isaacson

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Appendix J

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APPENDIX K — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 4, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 13-4791

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of November, two thousand sixteen.

IN RE: VITAMIN C ANTITRUST LITIGATION

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ANIMAL SCIENCE PRODUCTS, INC.,
THE RANIS COMPANY, INC.,

Plaintiffs-Appellees,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD.,
NORTH CHINA PHARMACEUTICAL GROUP
CORPORATION,

Defendants-Appellants.

Appendix K

ORDER

Appellees Animal Science Products Inc. and The Ranis Company, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ _____